STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2003B150(C)**

AMENDED INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

TIMOTHY BENNETT,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.

Administrative Law Judge Denise DeForest held the hearing in this matter on October 12, 2005, in Courtroom 4, and November 15 and 16, 2005, December 13, 2005, and February 9 and 10, 2006 in Courtroom 6 at the State Personnel Board, 633- 17th Street, Denver, Colorado. Assistant Attorney General Vincent Morscher represented Respondent. Respondent's advisory witness was James Abbott, the appointing authority. Complainant appeared and was represented by William Finger, Esq.

MATTERS APPEALED

Complainant filed five appeals and all of those matters have been consolidated in this case.

For the reasons set forth below, Respondent's action is **affirmed in part** and **rescinded in part**.

SUMMARY

This consolidated appeal covers a period of time beginning with the third round of layoff decisions at the Colorado Territorial Correctional Facility ("CTCF') in late April of 2003 and through the issuance of a corrective action on October 20, 2003.

Within that time period, Complainant has had his position as a Life/Safety officer at CFCF abolished and retention rights granted to a similar position at Ft. Lyons Correctional Facility ("FLCF"). Complainant challenges the lawfulness of both steps of this process, including a claim of age discrimination.

Complainant was also the subject of disciplinary action on August 8, 2003, relating to allegations of misconduct in four matters while he was on staff at CTCF, and was assessed a permanent reduction in base pay of $300 per month. He appeals that disciplinary action.

Complainant was investigated on suspicions that he had improperly taken state property when he was leaving CTCF. This allegation led to an administrative suspension with pay beginning on July 9, 2003, and lasting for the duration of the investigation. The suspension also led to a detention of Complainant and his wife when they entered CTCF facility grounds on August 11, 2003, to exchange a broke pager case. Complainant has grieved both the administrative suspension and the detention.

Complainant was issued a corrective action on October 20, 2003, based upon the allegations of improper disposition of state property and Complainant's entrance on CTCF grounds on August 11. Complainant grieves the corrective action.

Respondent has held onto some property that Complainant contends is his personal property. Complainant has grieved Respondent's decision not to release the property to him.

Complainant also received a close-out evaluation from his direct supervisor at CTFC which rated Complainant as "needs improvement". Complainant has grieved this evaluation as retaliatory and creating a hostile environment.

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ISSUES

1. Whether Respondent's decision to abolish Complainant's position was arbitrary, capricious, or contrary to rule or law.

2. Whether Respondent's decisions as to Complainant's retention rights were arbitrary, capricious, or contrary to rule or law.

3. Whether Complainant committed the acts for which he was disciplined;

4. Whether the discipline imposed upon Complainant was arbitrary, capricious, or contrary to rule or law;

5. Whether the discipline imposed was within the reasonable range of alternatives available to the appointing authority;

6. Whether the corrective action imposed by Respondent was arbitrary, capricious or contrary to rule or law;

7. Whether Respondent was arbitrary, capricious or contrary to rule in law in the manner in which it handled Complainant's grievances;

8. Whether Complainant is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

General Background:

1. Complainant was hired by Respondent on August 21, 1986 and began working at Fremont Correctional Facility ("FCF").

2. Complainant served three months in the United States military from April 1971 to July 1971. Complainant is a veteran and is recognized by Respondent as a veteran. Due to Complainant's military service, Respondent calculates Complainant's adjusted entrance on duty ("EOD") date to be June 19, 1986.

3. Complainant's primary work background is as a fire fighter. Complainant suffered smoke damage to his lungs as a result of that work, and his lung problems require him to miss work at times. At DOC, Complainant worked as a General Professional III ("GPIII") at FCF. He voluntarily transferred to Colorado Territorial Correctional Facility ("CTFC") on December 1, 1998, as a Safety Specialist II as part of the resolution of a personnel action. Complainant subsequently promoted from Safety Specialist II.

4. In early 2003, Complainant worked as a Life/Safety officer at CTFC. Complainant was DOC's first Life/Safety officer. His classified position was as a GP III, position number 31239.

Layoff decisions:

5. James Abbott began his assignment as warden of CTCF and the Women's Correctional Facility ("CWCF") on April 1, 2003. The two facilities were joined together administratively at that point. Prior to that time, Mr. Abbott had been the warden at WCF. Juanita Novak was the warden at CTFC until April 1, 2003.

6. In fiscal year 2003, the Colorado legislature imposed significant reductions on state agencies' budgets, and in the process required DOC to reduce its budget by 10%, or about $55 million in cost reductions. Eighty to eighty-five percent of DOC's budget is related to personnel costs. DOC implemented a reduction in force to meet the new budget requirements.

7. Nolin Renfrow, Director of Prisons, directed all DOC wardens to first utilize voluntary retirement incentives to reduce staff numbers. Approximately 100 employees took the incentives. Mr. Renfrow also instituted a hiring freeze.

8. While these policies reduced the number of employees within Respondent's operations, the change was not enough to meet the new budget requirements.

9. Respondent consulted with the Colorado Department of Personnel ("DPA") for advice on how to conduct position abolishment.

10. DPA provided advice on position abolishment to Respondent. Part of DPA's advice was that the facilities could use business needs in deciding which positions could be abolished.

11. The first step in abolishing positions was to abolish approximately 500 vacant positions. This step still did not eliminate sufficient personnel cost from Respondent's budget to meet the legislative budget requirements.

12. Mr. Renfrow left the ultimate decision on which positions had to be eliminated to the wardens. The Human Resources section ("HR") of DOC provided guidance to the wardens on layoff issues. HR also was responsible for taking the names of employees whose position numbers had been on the lists prepared by the wardens for positions to be abolished, prepared the lay off letters, and calculating the retention rights for those individuals.

13. Each employee within DOC holds a position denoted by a unique position number. The position numbers are used to link each position to the appropriate budget line for that position. As a practical matter, therefore, the decision to abolish a specific position number is the same as deciding that the employee holding that position number is to be laid off.

Round I of the Layoffs:

14. Round 1 of the layoff procedures were conducted by CTCF Warden Novak prior to the merger of the two facilities on April 1, 2003. Ms. Novak assigned her facility management team to recommend positions which could be abolished.

15. During consideration of which positions to eliminate, both Major Rebecca Rodenbeck and Associate Warden Kevin Milyard recommended that Complainant's position be abolished because they considered him to be a poor employee. Ms. Novak thought that the layoff decisions had to be made on the basis of seniority, so she did not follow the recommendation. Complainant's position was not abolished in Round I of the layoff procedures.

Rounds II and III of the Layoffs:

16. When Mr. Abbott started as warden at the joined CTFC/CWCF facility, the second phase of the layoff process was just beginning. Mr. Abbott gave the

facility management team the task of recommending which position numbers should be abolished. Mr. Milyard and Major Rodenbeck were again part of the facility management team tasked with making layoff recommendations.

17. The facility management team had been told by Respondent's Human Resources section ('HR") that seniority was to be considered in making decisions on which employees were to be laid off. The management team did not create three year time bands in order to determine seniority for purposes of state service. HR did not provide three-year time bands, or calculate state service seniority dates, for use by the management team. Mr. Abbott did not have access to any information on the senority of employees other than the length of time those employees had served at that facility.

18. The facility management team did not discuss veteran status in making its decisions as to which specific employees would have their positions abolished.

19. The facility management team spent a great deal of its time discussing how functions could be combined in the budget lines which had to be reduced. When it came to deciding the specific position numbers to be abolished, the management team members used a variety of factors in making their recommendations, including their personal opinions as to whether someone was paid too much and their personal opinions on the performance of individual employees. The facility management team considered a higher salary to be a legitimate business reason to recommend abolishment of a position. In determining performance, the facility management team did not use a performance-based matrix or attempt to average performance evaluation scores of employees.

20. There is no indication that the facility management team considered the age of employees in making position abolishment decisions. The facility management team also did not consider the upcoming ACA audit of the facility in making its recommendations.

21. Five employees at CTCF/CWCF were laid off in the second round of position abolishments in the first part of April, 2003. Complainant's position was not abolished in the second round.

22. By the third round of layoff considerations in late April, 2003, the maintenance line of the facility budget had to be reduced. Life/Safety officers are paid from the maintenance line of the budget. The administratively-joined CWCF/CTCF facility had two Life/Safety officers on staff. Robert Sounart was the Life/Safety officer at WCFC in early 2003. Complainant was the Life/Safety officer for CTCF.

23. The management team recommended, and Mr. Abbott agreed, that the administratively joined facilities needed only one Life/Safety officer, and that

Complainant was the one to be laid off and Mr. Sounart was to be retained. Mr. Abbott did not have information on any other DOC employees other than the ones at his facility, and he had no authority to recommend a position abolishment for any other facility than CTCF/CWCF.

24. If seniority had been calculated under Board Rule R-7-15 and that information used to create three year time bands for purposes of evaluating seniority, under Board Rule R-7-9, Complainant would have been placed in more senior time band than Mr. Sounart. If Respondent had then followed the requirements of Board Rule R-7-14, Respondent would lay off employees in more junior time bands before reaching Complainant's time band.

25. Eight employees of CTCF/CWCF had their positions abolished in the third round of the layoffs. Approximately 180 DOC employees received layoff letters in early May, 2003.

26. On May 7, 2005, Complainant received a letter signed by Joseph Ortiz, Executive Director for DOC, dated May 5, 2003, which informed him that:

> Effective, close of business on June 30, 2003, you will be laid off and your name will be placed on a/an GEN PROF III reemployment list for a maximum of one (1) year unless you are reemployed in a position in your current class before the one-year period expires....
>
> You have three business days, from receipt of this notice, to inform the Office of Human Resources... by e-mail ... or fax... if you wish to exercise your possible retention rights. If you fail to do so within these time frames, you shall forfeit your retention rights.

27. Complainant received this letter in a meeting with Mr. Abbott. At that meeting, Mr. Abbott told Complainant that the decision was made by looking at a position number and the dollars associated with that position.

28. Complainant made a timely request to exercise his retention rights.

Retention Decision:

29. At the time of the layoff, the HR section took the position that the Board rules in Chapter 7 ("Separation") did not address the abolishment of positions, but did address the retention rights to be provided to employees once the positions were abolished. The procedure that the HR section used in supervising and conducting the layoff procedures was consistent with that position.

30. HR did not view its role in the layoffs as having anything to do with the decisions of which positions were to be abolished, and the section did not perform any analysis of the lay off procedures used to identify specific positions

to be abolished. HR was in charge of preparing retention rights for employees affected by the layoff.

31. In order to make a determination of what retention rights would be available to an employee, HR requested that employees submit a resume and a current PDQ (which is the job description applicable to the position). HR reviewed the submitted resume and the PDQ in determining retention rights. HR also examined DOC records to determine the classifications to which employees have been certified in the past.

32. Complainant has been certified to the GP III and Correctional Officer I classifications.

33. Complainant submitted a resume which included his work as a life/safety officer. His resume refers to his experience in this manner:

> I am a progressive management specialist with 9 years of broad experience in the fire service, 10 years in emergency medical services, 3 years of management education and theory, 16 ½ years in corrections, 13 years as Fire Marshall/ Life Safety Coordinator and 2 years as Training Coordinator at the Fremont Correctional Facility, 3 years as Life Safety Coordinator at Colorado Territorial Correctional Facility in Cañon City, Colorado. Experience includes:
>
> 1. Graduate of the National Fire Academy
> 2. Policy and Procedures Development
> 3. Public Relations Program Development
> 4. Development of Colorado Certified Firefighter Training program for inmates of the Colorado Department of Corrections
> 5. Fire Inspection and Certification of Commercial Structures.

34. The reminder of Complainant's submitted resume lists a series of accomplishments as a fire safety fire instructor and as a trainer. The resume also includes, as part of his current responsibilities, that he is "responsible for management of budget for all fire safety related issues including procurement of fire equipment, maintenance of fire equipment, and training of fire fighting forces for 750 bed prison complex."

35. Complainant has had at least one job in which he did sales work. He listed this job in his original employment/promotion application with DOC, but he had not included this information in his resume. HR did not review all of the materials in an employee's file in making retention rights determination.

36. Complainant's PDQ shows that Complainant is expected to operate as an expert in fire safety and other safety matters. The PDQ does not indicate that Complainant had any formal supervisory or budget responsibilities.

37. HR prepared a series of charts showing the seniority of the employees in the positions affected by the layoff. HR used a three-year time band method to determine seniority, with veterans receiving start dates which accounted for their military service. HR also tracked which employees held veteran status within each time band.

38. The seniority time bands ran in three-year increments starting in 2003. The least senior time band encompassed employees with state service start dates in 2001 through 2003.

39. For the life-safety officer positions, HR determined that Complainant was the most senior life safety officer at DOC in terms of total state service time. Complainant was in the sixth time band and had veteran status.

40. The other life-safety officers qualified to be placed in less senior time bands, except for one who was in the same time band as Complainant.

41. HR considered the other Life/Safety officer at CWCF/CTCF, Mr. Sounart, to have a state service date of January 1, 1990, and to not have veteran status. Mr. Sounart's state service date would place him into the fifth time band, which is one time band less senior than Complainant's time band.

42. For purposes of ranking employees who fall within the same seniority time band, HR developed a retention matrix. The effect of the matrix was to rank employees, with the lowest ranking employees the individuals who must be displaced first. HR published an explanation of the matrix which had been revised in early March, 2003.

43. The HR Retention Matrix publication instructed that the matrix was to be used for ranking employees within a time band. The document explains the time band procedure for evaluating seniority.

44. The first level of matrix analysis was 100% performance based, and the performance was to be determined by a numerical average of the latest three years' overall ratings. Using the Pay For Performance rating system begun in 2001, for example, employees would be given zero points for a "needs improvement" rating, 1 point for an overall "satisfactory" rating, 2 points for a "commendable" rating, and 3 points for an "outstanding" rating. The points for the evaluations in the prior three years were totaled and then divided by three.

45. The Retention Matrix also explained how tie breakers would work for employees who shared the same time band and the same performance evaluation average.

46. HR used the Retention Matrix in evaluating the positions which would be offered to employees who were to receive retention rights. The Retention Matrix was not used by Respondent in deciding the abolishment of positions.

47. Of all of the life safety officers within DOC, James Abney at FLCF was the least senior Life/Safety officer and the only one who fell into the first seniority time band. HR ranked Mr. Abney's position as the least protected Life/Safety officer position for purposes of determining which Life/Safety officer would first be displaced when retention rights were applied. Life/Safety officer Rodney McClaren, with an adjusted EOD of May 1, 1999, fell into the second seniority time band. Mr. McClaren was bumped from his position by Life/Safety officer William Richter (adjusted EOD November 1, 1989).

48. Complainant's position was within the General Professional III ("GPIII") series. GPIII is a broad classification of jobs in the state system that are professional in nature. The jobs require the holders of these positions to operate independently in performing the full range of professional tasks. The position may serve as a resource to others or as a specialist in the professional field. GPIII's cannot move within the class unless they have the qualifications for the new position.

49. Some DOC case managers had been offered the chance to transfer from case manager to a safety and security Correctional Officer III position. No one talked to Complainant about transferring into a safety and security position at the COII or CO III level.

50. Respondent's lists of GPIII positions in existence as of May 2003 show that there were at approximately four vacant GPIII positions on the books at the point of early May 2003. Respondent's budget office was responsible for eliminating vacant positions from the budget lines. The HR section did not use vacant positions as available positions for purposes of Complainant's retention rights.

51. In determining which positions Complainant would be offered, HR used a retention matrix sheet. The work in preparing the retention matrix for Complainant showed that there was the possibility of a vacant GPIII position performing budget work in Canon City, position #3440. That position, however, required budget and financial management experience and the materials submitted by Complainant in support of his request for retention rights contained no indication that Complainant had financial management experience.

52. There was also a warehouse position available in Denver, but this position required purchasing experience. Complainant supplied no information about purchasing experience in the resume that he submitted with his retention rights request.

53. HR prepared a retention rights letter, dated June 2, 2003, for Complainant. The letter offered Complainant two options:

> Encumbered General professional III, Position #14283 at FLCF out of 50-mile radius OR Vacant Correctional Officer I, Position #37998 CSP within 50 mile radius.

54. Complainant was furnished with the retention rights letter on June 11, 2003. He responded in writing on June 16, 2003, and elected to be placed in the position of Encumbered General Professional III, position # 14283, at Ft. Lyons Correctional Facility.

55. Complainant did not prove that he possessed any minimum and/or special qualifications attached to any other type of GP III position other than that of Life/Safety officer, or that there were GPIII positions available during the retention consideration which would have accepted his qualifications as listed in his resume and his PDQ.

56. By memo dated July 25, 2003, Mr. Abbott referred nine of his former employees to Gene Atherton, Assistant Director Western Region, for consideration that they were suffering extreme hardship due to the retention rights offered. Complainant was one of the nine employees listed.

Age considerations for DOC Life/Safety officers:

57. At the time that Complainant received his lay off notice, Complainant was 51 years and 10 months old.

58. In addition to Complainant, the following Life/Safety officers were also older than 50 years of age by May 1, 2003:

> Clark (September 1949)
> Colvin (January 1952)
> Sounart (February 1952)
> Canterbury (May 1945)

59. Of this group of Life/Safety Officers over the age of 50, Complainant was the only one who had his position abolished, and he bumped a more junior employee's position. None of the employees in this group were bumped from their positions.

60. In terms of simple percentages, the over 50 group of Life Safety officers had 1 out of 5 with an abolished position (20%), and 0% of the group who actually lost a position within DOC.

61. The following Life/Safety officers were younger than 50 years of age by May 1, 2003:

Richter (November 1953)
McCallister (June 1956)
Adams (August 1961)
Abney (November 1972)
Yarberry (September 1963)
McClaren (June 1954)
Braden (September 1959)

62. Of the group of Life/Safety officers younger than 50 years old, Richter bumped McClaren. McClaren and Abney were bumped out of employment with DOC.

63. The group of Life/Safety officers of less than 50 years of age, therefore, had 1 out of 7 positions abolished (14.3%), with 2 out of 7 members (28.5%) who lost employment with DOC.

64. If this simple percentages approach is done using a protected age group of 40 to 70 years of age, rather than 50 years of age, then the results are 2 of 10 (20%) employees 40 years or older had positions abolished, with 1 out of 10 (10%) being bumped out of employment with DOC. Of the 2 employees in the under 40 group, neither had their position abolished, but one (50%) was bumped out of employment with DOC.

65. Complainant is six months older than the man whose position was saved over his at CTCF, Mr. Sounart.

Events Related To The August 8, 2003 Disciplinary Action:

Sleeping on Duty/ Return To Duty Issues:

66. On Wednesday, June 25, 2003, Complainant was at his desk at about 9:30 in the morning and he fell asleep. At least one other employee noted that Complainant was sleeping, and notified Major Linda Maifeld.

67. Complainant had taken Xanax for the first time the day before to help with a sleeping problem. The drug had been prescribed by his physician on June 23, 2003.

68. Major Maifeld sent Complainant home soon after she discovered that he was sleeping.

69. By phone on Wednesday, Complainant and Major Maifeld discussed the effect of the drug on Complainant's system. Complainant told Major Maifeld that the drug would be in his system for 48 hours. The two of them also discussed what would happen with a class that Complainant was to teach on Thursday morning. Major Maifeld made the decision that Complainant would not teach the class.

70. Major Maifeld told Complainant during the phone call on Wednesday that he was not to return until Friday and to obtain a medical clearance before he returned.

71. Complainant contacted his physician for a medical clearance on Wednesday afternoon. He picked up the document on Thursday morning.

72. Complainant returned to the facility on Thursday afternoon. Major Maifeld was informed at the end of the day on Thursday that Complainant had returned to the facility.

73. On Friday, Major Maifeld located Complainant and asked him why he had returned to the facility on Thursday when he had been told to return on Friday. Complainant said that he had a doctor's note by that time so he came back. Major Maifeld reminded Complainant that a doctor's note does not, in itself, allow an employee to return to work, and that the warden's office had to agree that it was appropriate. Complainant admitted to Major Maifeld that he was often at the fringes of obeying departmental policies and procedures.

Inspection Issues:

74. In early 2003, Doug Reams was a housing officer in CTCF's cell house 1. Part of Officer Reams' duties were to check the fire extinguishers and air packs in cell house 1 and to report any problems to the Life/Safety officer.

75. On May 5, 2003, Mr. Reams noted that fire extinguisher #073 needed to be recharged and was showing a red status. He filled out an incident report regarding the issue and put that report in Complainant's mailbox. This was the standard procedure for obtain service on discharged extinguishers.

76. Mr. Reams also spoke with Complainant about the need to check the extinguisher at about this time as well.

77. On June 2, 2003 Mr. Reams again noticed that the same fire extinguisher was still showing that it needed to be recharged. He completed another incident report on the matter.

78. On June 7, the fire extinguisher was replaced by maintenance personnel. Complainant did not replace the extinguisher.

79. On June 17, 2003, Mr. Milyard spoke to Complainant about the fire extinguisher. Complainant told Mr. Milyard that he had checked the extinguishers around May 22, 2003, and that it did not need to be recharged because it was still in the low green section.

80. On June 30, 2003, Mr. Milyard checked with Mr. Reams about whether the needle was in the red on the extinguisher or was reading at a low green level. Mr. Reams confirmed that the extinguisher was in the red. Mr. Milyard had Mr. Reams draft another report noting both checks of the fire extinguisher and his report to Complainant.

81. Mr. Reams wrote a report on or about July 8, 2003. In it he repeated the information about the fire extinguisher status, and added that he had also told Complainant that the cell house 1 Scott Air packs were also low and Complainant had failed to service those devices.

82. Complainant suffered from a bout of his chronic lung problems on about May 13, 2003, and began taking Family and Medical Leave Act (FMLA) leave beginning on May 19, 2003. Complainant took intermittent sick leave for the remainder of May and part of June 2003.

The July 14, 2003, 6-10 Process:

83. By letter dated July 3, 2003 and received on that date, Mr. Abbott notified Complainant that he would hold a 6-10 meeting to discuss issues involving Complainant sleeping at his desk and other performance issues. The date for the 6-10 meeting was set as July 14, 2003.

84. On July 14, 2003, Mr. Abbott held a 6-10 meeting for Complainant regarding the issues of sleeping while on duty, returning to work against a specific direction, failure to re-charge the cell house one fire extinguisher, and failure to re-charge the Scott Air packs.

85. By letter dated July 16, 2003, Complainant's counsel asked Mr. Abbott to supply a number of records to Complainant. The list described ten types of records, including incident reports, records relating to the cell house fire extinguisher at issue, all inspection reports issued by Complainant, and all memos and documents issued in 2002 and 2003 concerning the breathing apparatus. This request is a document request and not a factual response to the issues raised at the 6-10 meeting. The document request also included a request for Complainant's time records.

86. Mr. Abbott released time records to Complainant, and denied the request for the additional materials.

87. By letter dated July 28, 2003, Complainant's counsel provided a lengthy reply to the issues raised at the 6-10 meeting.

88. Complainant admitted to having slept on duty, disputed that he was told to return only on Friday but stated that he was a bit foggy because of the medication when he spoke with Major Maifeld on the telephone, and disputed that the fire extinguisher or the Scott air packs needed to be re-charged by him.

89. On August 8, 2003, Mr. Abbott issued a Notice of Disciplinary Action to Complainant. He found that Complainant had (1) failed to perform competently; (2) engaged in willful misconduct by violation of agency rules that affect the ability to perform his job; and (3) had willfully failed to perform duties that are a regular part of his employment with DOC. Mr. Abbott cited to DOC AR 1450-1, Staff Code of Conduct, Section IV, which requires that staff are to remain fully alert and attentive during duty hours, that staff shall comply with and obey administrative instructions, and that staff shall neither falsify any documents nor willfully depart from the truth in giving testimony or in connection with any official duties or official investigation.

90. In his August 8, 2003 Notice, Mr. Abbott adopted the version of events re-iterated by Major Maifeld, and found that Complainant did fall asleep on duty and that he returned to work on Thursday after having been told by Major Maifeld that he should return on Friday and not Thursday.

91. The Notice also finds that the report that the cell house I fire extinguisher was in need of recharging in both May and June 2003 was credible and supported by reports from Officer Reams and Lt. Marge Sartor. Mr. Abbott also found the report that the Scott air packs were reported as requiring re-charging and that Complainant had failed to do so.

92. Mr. Abbott considered Complainant's contention that he had been on leave most of the month of May and could not be held responsible for re-charging the fire extinguisher. Mr. Abbott found that Complainant had been at work on May 5, 2003 (the date the first report had been filed) and was present for a week after that date.

93. Mr. Abbott took into account that Warden Novak had previously disciplined Complainant for failing to perform fire extinguisher checks and other related matters, and that Ms. Novak's fine had been $100 per month for 6 months. Mr. Abbott assessed a permanent $300 per month reduction in Complainant's base pay, effective September 1, 2003.

Events of late June and early July, 2003:

94. On June 30, 2003, Complainant asked Mr. Milyard to sign a leave slip for eight hours of vacation time for July 1, 2003. Mr. Milyard asked Complainant if Mr. Abbott had approved the request. Complainant told him "yes."

95. Mr. Milyard picked up the phone to check with Mr. Abbott, and Complainant admitted to him that Mr. Abbott had approved only four hours of leave.

96. On July 7, 2003, Complainant told Mr. Sounart that CTCF's annual fire department inspection was being moved from July 2003 to September 2003 a the request of Mr. Milyard. Mr. Milyard made no such request.

97. Complainant was informed that his new position at FLCF would begin on July 10, 2004. He asked for, and received, permission to go to FLCF early so that he could spend a few days with Mr. Abney before Mr. Abney's employment ended. Complainant was given permission to go to FLCF on July 8, 2003.

Public Disclosures:

98. After Complainant received the letter abolishing his position, Complainant contacted one or more state legislators to complain about Respondent's improper application of the state personnel rules regarding layoffs.

99. At about the same time. Complainant also made statements to the press and appeared on a local television station. Complainant took the position in these public statements that Respondent was using the layoff procedures to discriminate against older workers with seniority in the state system.

Stolen Goods Investigation and Paid Administrative Leave:

100. On July 7, 2003, Complainant loaded a dolly with a number of boxes of materials from his office and took the dolly out to the main doors of the facility. One of the employees notified Major Rodenbeck that Complainant was leaving the facility with a significant number of boxes.

101. Major Rodenbeck contacted Complainant while he was still inside the facility. She asked him what was in the boxes, and Complainant told her that it was personal property. Major Rodenbeck requested to inventory the boxes. Complainant objected to the inventory unless the warden asked for it.

102. Major Rodenbeck and Complainant went to the warden's office. Major Rodenbeck asked for permission to inventory the boxes. The warden agreed to the inventory.

103. The boxes contained ice trekkers (slip-on shoe spikes for crossing icy terrain), training videos, sample gloves, three CDs and five MSDS diskettes, various office supplies, obviously personal items such as coffee cups filled with pens, pencils and mementos and a tub of candy. Major Rodenbeck also located a first aid kit box marked as property of State of Colorado, which she confiscated.

104. Complainant told her that the office supplies were items that he had purchased because no one bought him anything. He told her that he had decided to take a first aid box to Ft. Lyon to show them and that the CTCF facility had a number of the boxes. Complainant also told her that he would pick up his code books when he was back at the facility later, probably on July 14 when he had a meeting at CTCF.

105. Mr. Abbott ordered that an inventory be taken of Complainant's office, and that the door be locked. Mr. Abbott also asked a staff member to go through the purchasing orders to determine if there was any indication that facility supplies were missing.

106. By letter dated July 9, 2003 and delivered to Complainant on the same date, Mr. Abbott placed Complainant on paid administrative suspension with pay pending an investigation into whether Complainant had taken facility or state property.

107. Mr. Abbott determined that there was a question as to whether Complainant had properly removed his own personal property or had removed facility property when he left on July 7, 2003. Mr. Abbott referred the matter of the possible removal of CTCF property to the DOC office of the Inspector General.

108. On August 14, 2003, Complainant had a meeting with Investigator Danny Lake of the Office of the Inspector General. Investigator Lake asked Complainant if he could search the boxes that Complainant had been permitted to remove from the facility on July 7, 2003. Complainant agreed, and two of them traveled to Complainant's house.

109. Mr. Lake searched the five boxes that Complainant had at his home. He took from those boxes six pairs of sample gloves sent to Complainant by Turtle Gloves, Inc., approximately 100 fire drill forms, 3 self-inking tamps, 4 eye safety and hearing protection videotapes, 3 pairs of Ice Trekkers, a back up copy of Complainant's P:/ drive on CD Rom, 1 sample of chemical dike from New Pig Corporation, and 1 package of Avery gum tabs.

110. Complainant explained that the gloves, ice trekkers, and chemical dike were samples from manufacturers that had been sent to him at CTCF. He told Mr. Lake that he was intending to take those supplies with him to his next

assignment. Complainant also acknowledged that the self-inking stamps and the fire drill forms were paid for by CTFC and that he had not received permission to take them with him. He told Mr. Lake that he had wanted to take examples of these items with him to FLCF.

111. Mr. Lake performed additional inquiry into Complainant's purchasing while at CTCF, and related issues. Mr. Lake ultimately determined that there had been no criminal wrongdoing in the removal of items from CTCF because Complainant had planned to use the items in his next assignment.

August 11, 2003 Entrance Into The CTCF Facility Grounds:

112. The letter informing Complainant of his administrative leave status during the investigation of the stolen goods issue stated, in pertinent part:

> I have determined that it would be mutually beneficial to suspend you with pay during the course of this investigation or until a Rule 6-10 meeting is conducted. Therefore, effective immediately, you are suspended with pay until further notice. Because you are on paid leave, you are required to be available during your work hours of 0800 to 1700, Monday through Friday. You are also instructed not to contact anyone at the Colorado Territorial Correctional Facility regarding the issues under investigation.

113. On July 9, 2003, Mr. Abbott sent a memorandum to Tower 1 and the front lobby of CTCF which stated: 'As of this date, Life Safety Officer, Tim Bennett, is not allowed access to this facility unless given clearance by me."

114. The memo of July 9, 2003, barring Complainant from the facility without permission was also sent to five other senior staff member, with three copies to the shift commanders and the facility file. This memo was not provided to Complainant.

115. Complainant interpreted the provision of his July 9, 2003, suspension letter that he had to remain available to the facility as requiring that he have his pager on so that the facility could use it to contact him if and when necessary.

116. Complainant was not provided with any other communication which informed him of any different set of requirements.

117. On August 11, 2003, Complainant and his wife were out for breakfast and in the area of the facility. Complainant's wife was driving their van. Complainant's dogs were in the car with Complainant and his wife.

118. Complainant suggested that they stop at the facility so that Complainant could obtain a replacement piece for his clip for his pager, which was broken at the time.

119. Complainant's wife drove the van to the vehicle entrance at the facility. As Complainant was starting to exit the van, the guard mistakenly decided that the van was the facility's mail van and waved the vehicle inside the gate. The gate opened and Complainant's wife drove inside the facility past Tower 1. Complainant and his wife drove over to the communications equipment building, and Complainant went inside the communications building to exchange his pager clip.

120. After the guard had allowed the van to enter, the guard realized that he had been mistaken and that it was Complainant who had entered the facility.

121. The guard contacted the shift commander, Captain Hesser, and informed him that Complainant had entered the facility. The guard was instructed to detain Complainant and his wife. Captain Hesser located Major Maifeld and informed her that Complainant was on the grounds of the facility.

122. Complainant took a few minutes to exchange the pager clip at the communications building, and then returned to his vehicle. His wife turned the van around and drove back to the gate. At the gate, the vehicle was stopped and Complainant was informed that he was to wait for Major Maifeld to arrive.

123. Capt. Hesser arrived at the gate. Major Maifeld also went out to the gate to find out why Complainant had entered the facility against orders. Complainant protested that he came to replace his broken pager clip and had not been informed that he was not to enter the facility.

124. Complainant's wife strenuously objected to being detained. After an initial inquiry where Complainant's wife was present with Complainant, Capt. Hesser ordered Complainant's wife to wait in the van. Complainant's wife protested at first and then waited in the van for a time while officers spoke with Complainant. Complainant's wife then got out the van and stood about ten feet from the group and the officers spoke with Complainant. She could hear what Major Maifeld was saying because the Major was raising her voice.

125. Guards performed a short inspection of the van. Nothing was taken from the van.

126. Complainant and his wife were released after approximately thirty minutes.

127. Complainant and his wife filed a complaint with the police department over the detention. The district attorney declined to take action.

128. Complainant is aware that personal pets are not permitted on DOC facility grounds.

129. Complainant is aware that non-DOC personnel must receive authorization before they can enter a DOC facility.

The August 15, 2003 Memo from Nolin Renfrow:

130. On August 15, 2003, DOC Deputy Director Nolin Renfrow issued a memo to wardens concerning job offers. The text of that memo, in its entirety, read:

> Please be aware that one of the conditions of offering displaced staff a position in your facility is that they MUST drop their cases against us. Offering a person a position at the same pay and grade means their pay, tenure and status have not been adversely affected, therefore they have no standing and allowing them to continue their appeals will just close up the DPA with cases that have no merit. I will have Holly e-mail a list of staff that has filed appeals against the department.
>
> Also...we still have people in the facilities referring to themselves as a personnel liaison. We risk losing these positions if they represent themselves as an extension of the HR offices. Additionally, they should not give advice on personnel matters.
>
> Thanks
>
> Nolin

131. On August 19, 2003, Holly Winters sent a list to the recipients of the earlier e-mail from Mr. Renfrow. This list including a heading which said "Appeals – Layoff" and contained the names of 119 employees who had filed a case against the Department, with a notation of the case number and the type of allegation for many of the entries.

132. Complainant's name was on the list, associated with State Personnel Board case 2003B150.

133. Complainant did not suffer any consequences from the inclusion of his name on this memo. Complainant did not withdraw any of his appeals to the Board. He was offered, and accepted, a position at FLCF before this memo was circulated.

The September 26, 2003, 6-10 meeting:

134. By letter dated September 11, 2003, Mr. Abbott informed Complainant that he was going to hold an R-6-10 meeting regarding the property issue and the incident involving Complainant's August 11, 2003 entry onto CTCF property. The meeting was scheduled for September 26, 2003.

135. At the meeting, Complainant had his counsel with him. Mr. Abbott had Anna Marie Campbell with him. Ms. Campbell is the manager of DOC's Dispute Resolution Team.

136. At the time of the September 26, 2003, meeting, Mr. Abbott had a written authorization to conduct the 6-10 and any disciplinary action for Complainant.

137. At the meeting, Mr. Abbott described the information he had about Complainant's removal of property from CTCF. He also described what he had learned about Complainant's August 11, 2003, entry onto CTCF facility grounds.

138. After Complainant had an opportunity to add information about the issues, Mr. Abbott informed Complainant that the administrative suspension was lifted. He also told Complainant to contact Mr. Renfrow concerning his assignment.

Retention of Property Issue:

139. At the conclusion of the 6-10 meeting held on September 26, 2003, Complainant requested that he be allowed to go to his old office and retrieve personal property still present in the office.

140. Mr. Abbott had instructed staff to gather Complainant's personal items in a box and to inventory the box for delivery to Complainant.

141. The box included items that Complainant realized were state property, such as a Polaroid camera. Complainant objected to the contents of the box, and marked the items on the inventory sheet which he believed were state property. Complainant also found some items that he believed that the CTCF thought had been taken from the facility.

142. Complainant, Mr. Milyard, and Ms. Campbell went to Complainant's old office to look for additional items that Complainant believed were his personal property.

143. Complainant told the staff that he wanted to write out what he thought was his property that he had left in the office. He filed a list of items that he contended were still missing and which were his personal property:

Books that have Colorado State library cards inside the front cover. Complainant contends that the books were items he brought to Fremont CF in order to set up a staff library.

Box of plastic bags in a box addressed to the Employee Council.

A box with marbles and erasers – Complainant contends that he purchased these items to use for training, he would put the items in a plastic bag along with a note and then give them away at training.

Printer stand under printer: Complainant contends that he purchased the stand from Quill corporation with his personal funds.

Surge protector – Complainant contends that he purchased this item with personal funds when at the Fremont CF.

CD Rom Wire Stand – Complainant contends that he purchased this item with his personal funds.

144. Complainant has been unable to prove by a preponderance of the evidence that these items were purchased using his own funds. He has not been able to produce any documentation that he brought these six types of property into CTFC, even though CTFC requires that forms be filled out for personal property brought into the facility. He has also produced no receipts or other indications that the purchases were not made using facility funds.

The September 25, 2003, Performance Evaluation By Mr. Milyard:

145. Once the administrative suspension was lifted, Complainant was able to begin work at his new assignment. On September 25, 2003, Mr. Milyard prepared a close out Performance Evaluation for Complainant covering April 1, 2003 through October 1, 2003.

146. Mr. Milyard rated Complainant overall as "needs improvement", which is the lowest category.

147. In the five competency areas, Mr. Milyard rated Complainant as satisfactory in Job Knowledge and in Customer Service.

148. As explanation for the Job Knowledge rating, Mr. Milyard noted:

> There is almost no doubt that Mr. Bennett possesses the knowledge to perform the duties of the Life Safety Officer. However, Tim does seem to have difficulty in performing the basics of his position as well as following through with tasks and job duties

in a timely manner. Tim needs to become more actively involved in the daily operations of the facility at all levels and with all areas."

149. As explanation for the Customer Service rating, Mr. Milyard noted:

> Mr. Bennett has displayed good customer service skills, but he is less willing to go the extra mile for issues he is not personally interested in. However, when Tim wants to get something accomplished, he can do it.

150. Mr. Milyard rated Complainant as "needs improvement" in three core competency areas: Accountability/Organizational Commitment; Communication; and Interpersonal Skills.

151. As support for his rating in Accountability/Organizational Commitment, Mr. Milyard wrote:

> During this performance period, negative performance issues have been addressed with Mr. Bennett. Tim needs to greatly improve in the area of professional conduct while working for the Department of Corrections. Tim has failed to maintain blood spill kits, performing monthly fire extinguisher checks and follow-up on plan or action responses to inspection deficiencies during monthly rounds. Mr. Bennett is also less than honest in discussing work related issues, and this causes concerns in regards to the integrity of the Office of Life Safety and often creates strife with those staff with whom he interacts.

152. In support of his rating in the Communication area, Mr. Milyard wrote:

> Tim has good verbal communication skills; however, it seems that he deliberately "forgets" to share information, leaving the other person wondering what is missing in the conversation. It takes specific questions from the recipient to obtain the information requested. At times, Tim has communicated decisions to others implying or specifically stating he was acting at the behest of the Warden or Associate Warden with no actual authority to do so.

153. In support of his rating of "needs improvement" in the category of Interpersonal Skills, Mr. Milyard wrote:

> Tim comes across very willing and honest when you meet him. It is apparent that as long as he is happy with his supervisor, everything is great. As soon as a supervisor attempts to hold him accountable for his actions or his lack of actions, he asks to be assigned to

someone else. This has been an ongoing pattern for years with Tim.

154. Complainant grieved this performance review on September 26, 2003. Complainant asserts that this performance review is retaliatory and creates a hostile work environment.

October 20, 2003 Corrective Action:

155. On October 20, 2003, Mr. Abbott issued a corrective action to Complainant.

156. The corrective action recounts the property issue from the point where Complainant was stopped by Major Rodenbeck with a dolly of boxes, and contains Complainant's explanations for various items; Complainant had sent a fax to Mr. Abbott on October 1, 2003, containing his explanation on a variety of property issues.

157. The corrective action contains a list of four items that CTCF was still missing, including a Microsoft Publisher program, one 2000 international Codes CD, one 1997 ICBO Codex press CD, and three self-inking rubber stamps.

158. The letter recounts that Complainant had acknowledged that the work gloves, ice trekkers, video tapes and a chemical dike were samples sent to Complainant by manufacturers. Mr. Abbott also records that Complainant had asserted that he had purchased many office supplies for his work out of his personal funds.

159. Mr. Abbott concludes that the missing and taken property issue violated CTCF Implementation Adjustment 300-27, Facility Access and Control, which provides that property and equipment of leaving the facility must be documented on an approved permit form. Mr. Abbot found that Complainant had no forms documenting that he had brought the disputed property into the facility or that he had been given permission to take property out.

160. Mr. Abbott determined that Complainant had produced no proof of ownership of numerous disputed items. He further determined that Complainant had violated DOC AR 1450-1, Staff Code of Conduct, insofar as it relates to the provision that staff shall neither falsify any documents nor willfully depart from the truth, in giving testimony or in connection with any official duties or official investigation. Mr. Abbott did not describe what statement he though Complainant had made that was falsified or willfully departing from the truth.

161. Mr. Abbott also determined that Complainant had violated the same AR, at the requirement that staff be accountable and efficient in the sue of state

resources. "Staff shall not use or allow the use of state time, supplies, or state-owned or leased property and equipment for their private interests..."

162. Mr. Abbot found that Complainant had violated personnel Rule R-1-10, which prevents employees from accepting outside compensation for performance of state duties, including any gratuity, gift or other thing of monetary value that could result in preferential treatment. In addition, Mr. Abbott determined that Complainant had violated Fiscal rule 2-8, which prohibits employees from receiving "any type of benefit by virtue of their position unless such benefit is provided by State Statutes or State Fiscal Rule."

163. The corrective action also discusses the incident on August 11, 2003 when Complainant and his wife entered the CTCF facility grounds.

164. DOC Administrative Regulation and CTFC Implementation Adjustment 300-27 Facility Access and Control, provides that vehicle entrance into the physical perimeter of a facility by DOC staff requires that staff "shall exit the vehicle." A similar provision requires that non-DOC staff also '"shall exit the vehicle" upon vehicle entrance into the physical perimeter. CTFC Implementation Adjustment 300-27 requires that all areas are required "to request authorization for pedestrian facility entrance beyond master control or pedestrian or vehicle entrance past Tower 1, Tower 4 , or Tower 10."

165. Mr. Abbott found that, by driving through the gate without permission, and without exiting the vehicle, Complainant had violated the requirements of policy 300-27. He specifically found that in entering the facility Complainant "also violated [the] named regulation and procedure by entering the facility in your personal vehicle accompanied by a civilian without my express, written permission."

166. Mr. Abbott concluded that, because of the violation, he had decided to issue a corrective action to Complainant. He ordered Complainant to "cease and desist personally purchasing and bringing in personally purchased items for use at your DOC work sites without the appropriate prior authorization of the area's appointing authority. It is strongly emphasized that you make a diligent effort to abide by written policies

Complainant's Position In the Second Half of 2003:

167. After Complainant's position was abolished, he had several discussions with Mr. Renfrow. Complainant and Mr. Renfrow have known each other since they both served at FCF, and they knew each other socially in Cañon City.

168. Complainant told Mr. Renfrow that he was thinking of retiring in January 2004 and that he didn't want to go out to FLCF. Complainant asked if he could work in Cañon City until his retirement.

169. Mr. Renfrow agreed to assign Complainant to help Gene Atherton address a backlog of work. This temporary assignment kept Complainant in Cañon City until after the holidays.

170. Complainant decided not to retire and instead began work at FLCF on January 5, 2004.

171. Complainant rented an apartment while he was working at FLCF rather than move his primary home closer to his work. His wife stayed at their house in Cañon City. Complainant drove back and forth on weekends from FLCF to Cañon City.

Performance:

172. Complainant has had a significant number of corrective actions, disciplinary actions, performance notes, and performance plans over his career at DOC.

173. Complainant's personnel file contains a disciplinary action dated January 24, 1992, for removing a computer from a staff assistant's office and attempting to transfer information from the computer.

174. Complainant received a Corrective Action / Performance Improvement Plan dated March 5, 1998. The documentation identifies issues regrind Complainant's qualify of work, quantity of work, problem with communication and interpersonal relations and organizational commitment.

175. Complainant received a Corrective Action / Performance Improvement Plan dated July 21, 1998. This plan states that critical persons do not trust Complainant's work, the he failed to replace fire extinguishers, failed to appear at safety meetings, and went behind his supervisor's back in an attempt to change decisions by his supervisor.

176. Warden Novak imposed a corrective action on Complainant by letter dated February 14, 2001, for providing an inmate with unauthorized materials. She imposed a corrective action on Complainant on June 5, 2002, related to problems with inspection of two fire extinguishers.

177. Warden Novak also instituted a Performance Improvement Plan ("PIP") for Complainant on August 28, 2001, because of the results of a facility inspection which found fire extinguishers which had not been checked.

178. By letter dated October 8, 2002, Ms. Novak imposed a disciplinary action based upon three issues, including failing to conduct fire drills for a quarter and failing to inspect two fire extinguishers. The third issue arose when Complainant

called DOC Director Ortiz's office to raise a water use issue that he said he had raised with the warden but thought the warden was ignoring. In the course of discussing the reasons for her action, Ms. Novak noted that she had found that Complainant had initially lied about the fire drills, that he had lied to a central office staff member and said that he had met with the warden about the water issue, and that he had lied when he was first confronted about making the statements about the water use issue and denied having made the phone call to Director's Ortiz' office.

179. Complainant received a Performance Improvement Plan ("PIP") on August 17. 2004, from Phil DeFelice, in which Mr. DeFelice reported that Complainant had provided a memo to Warden Zenon concerning Complainant's complaints of deficiencies in the fire detection system. Mr. DeFelice noted that sending the memo to the warden without providing it or the information to Mr. DeFelice was a violation of the chain of command, and he disputed Complainant's statement of the facts as inaccurate The PIP required Complainant to submit memos or communications from Complainant to DOC staff or outside stake holders that are related to job function to be first be submitted to supervisor for approval, and that all information in the communications be factual and supported with written documentation. Complainant petitioned the Board to review this grievance, but the Board declined to do so.

180. Complainant has also received approximately nine letters of counseling during his employment with DOC.

181. Complainant's performance review in the period of time between April 1, 2000, and March 31, 2001, evaluated him as a competent employee.

182. Complainant's overall evaluation from April 1, 2001 through March 31, 2002, was as a satisfactory employee.

183. Complainant's review for April 1, 2002, through March 31, 2003 evaluated him as a satisfactory employee.

Complainant's transfer requests:

184. Complainant has filed three transfer requests since he began work at FLCF.

185. On May 26, 2004, Complainant requested a transfer to a Life/Safety officer position at Centennial Correctional Facility. On the same day, he also requested transfers to the Colorado Territorial Correctional Facility and the Cañon Minimum Centers for Life/Safety positions at those facilities. The warden at FLCF, Carl Zenon, approved all three requests on May 27, 2004.

186. Mr. Sonard, the Life/Safety officer who remained at CWCF at the conclusion of the layoff process in 2003, transferred to Cañon Minimum in 2004. A new DOC employee, Dale Carroll, filled the CWCF/CTCF Life/Safety officer position. No one at CTCF contacted Complainant about the vacancy when Mr. Sonard left. Mr. Abbott felt that Complainant would not be the right person for the job because Complainant couldn't do the job that the facility needed.

187. Mr. Carroll left the position at CWCF/CTCF after a short period of time. The position remained vacant for a number of months. No one from CTCF contacted Complainant about a vacant position.

188. Under Respondent's transfer rules, transfers requested by the employee required the permission of the current facility warden as well as acceptance of the receiving warden. The receiving warden has the discretion to determine whether a position will be filled by transfer or by other selection procedures. Wardens who receive transfer requests will often evaluate the work performance history of the requesting employee prior to making any decision.

189. Complainant did not receive the permission of any of the receiving facility wardens to transfer into their facilities.

Procedural History of Appeals:

190. Complainant filed five different appeals with the Board.

191. On May 19, 2003, Complainant appealed the abolishment of his position as a General Professional III – Life Safety Officer, effective June 30, 2003, on the grounds that the abolishment was announced without any reason and that he was not provided with retention or bumping rights. Complainant also alleged that the abolishment of his position was due to age discrimination and in retaliation for filing one or more grievances concerning work conditions. This case was filed as 2003B150, and was a timely appeal of the lay off letter that Complainant received on May 7, 2003.

192. On June 23, 2003, Complainant filed an appeal of the notice of retention rights, which he had received. The appeal alleges that the retention rights violated Complainant's rights and procedure, and also alleged discrimination on the bases of age and retaliation. Complainant's appeal form was placed into case file 2003B150. This filing was a timely appeal of the notice of retention rights received by Complainant on June 11, 2003.

193. On August 18, 2003, Complainant filed an appeal of a disciplinary action consisting of a permanent pay reduction of $300.00 per month, effective September 1, 2003. The disciplinary action was based upon an evaluation of four alleged incidents: 1) sleeping on duty on June 25, 2003; 2) a failure to obey a specific direction from Major Maifield as to when Complainant could return to

work on June 27, 2003; 3) Failing to inspect and re-charge fire extinguisher No. FX 623983 in Cell house 1 during May or early June 2003; and 4) failure to recharge Cell house I Scott air packs. This appeal was originally assigned case number 2004B047, and constitutes a timely appeal of the disciplinary action announced by letter received on August 12, 2003.

194. On December 12, 2003, Complainant filed a petition for review of two step II grievance responses he had received from Gene Atherton. Complainant's appeal also included a whistleblower complaint alleging retaliation for the failure to remedy retaliation and violation of personnel rights perpetrated by Warden Abbott, the creation of a hostile work environment, and the denial of retention rights. The petition was given case number 2004G052.

195. The December 12, 2003 petition is a timely appeal of at least some of the grievance issues answered in an Amended Step 2 Grievance Response received December 2, 2003. The grievance issues which are timely and otherwise constitute lawful appeals under the Board rules include the issues raised in the July 21, 2003, step 1 grievance process, the August 15, 2003 step 1 grievance filing, the October 30, 2003 step 1 grievance issues, and the September 26, 2003 step 1 grievance issues insofar as they represent retaliation or hostile work environment. This petition also includes a timely assertion of whistleblower rights, insofar as those rights are asserted for issues involved in the associated grievances and not for older incidents. *See* C.R.S. § 24-50.5-104(3).

196. On January 21, 2004, the Board ordered that 2004B047 and 2004G052 were to be consolidated with 2003B150(c).

197. On February 23, 2004, Complainant filed an appeal of a February 9, 2004 letter denying a grievance related to the disposition of property "and various violations of DOC and personnel Board regulations on grievances." In this grievance appeal, Complainant alleges that Respondent acted in an arbitrary and capricious manner in converting Complainant's personal property, creating a hostile work environment, violating DOC and Personnel Board regulations on the handling of step I grievances, and refusing to grant relief. This grievance appeal also alleged discrimination based on retaliation for alleging age discrimination and "in retaliation relating to abolishment of position and retention rights and filing discrimination claims with CCRD in calendar year 2003 and alleging whistleblower violations." This petition was a timely appeal of the Amended Step 2 Grievance Response received by Complainant on February 11, 2004. The Board consolidated this petition into 2003B150(c) by order dated March 11, 2004.

DISCUSSION

I GENERAL:

A. Burden of Proof:

In this *de novo* proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700, 704 (Colo. 1994).

Complainant, on the other hand, has the burden to prove that the abolishment of his position and choice of retention rights, and the agency's handling of his grievances, were arbitrary, capricious, or contrary to rule or law. *See Velasquez v. Department of Higher Education*, 93 P.3d 540, 542 (Colo. App. 2003)(holding that it was appropriate to hold the Complainant to the burden of proof in a layoff appeal). It is also Complainant's burden to prove his age discrimination and whistleblower retaliation claims as well. *See Colorado Civil Rights Division v. Big O Tires, Inc.*, 940 P.2d 397 (Colo. 1997)(discrimination); *Ward v. Industrial Commission*, 699 P.2d 960 (Colo. 1985)(whistleblower).

B. Arbitrary or Capricious Action:

Arbitrary or capricious agency action may arise in one of three ways:

1) neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it;
2) failing to give candid and honest consideration of evidence before it on which it is authorized to act in exercising its discretion; or
3) exercising its discretion in such manner after consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions.

Lawley v. Dep't of Higher Education, 36 P.3d 1239, 1252 (Colo. 2001).

II. HEARING ISSUES:

A. Respondent violated the state layoff statute and Board rules governing layoffs in abolishing Complainant's position:

1. Respondent's layoff procedure ignored critical procedural protections located in the Board rules:

In this case, Respondent's HR section used a set of procedures consistent with the Board rules in the consideration of retention rights – evaluating employee seniority using three year total state service time bands, generating and applying a performance matrix, etc. None of these procedures, however, were applied to the step of this process prior to the consideration of retention rights.

Respondent's failure to use time bands and other required procedures has a decided effect in this case. There were two Life/Safety officers at a facility which needed to reduce the budget lines which funds such positions. The decision as to whether the facility needed two such positions, or can do with one (or perhaps with none) is fundamentally a question for the facility managers to decide using their business judgment. Once the decision is made that one Life/Safety position can be abolished, however, we come to the key question controlled by Board rules and state law – which employee is to be laid off?

Under the Board rules, departments making lay off decisions must create three-year time bands in order to decide which employee is to be laid off. These time bands become the primary gatekeeper in protecting seniority because the rules mandate that employees in more junior time bands must be laid off prior to the employees in more senior time bands. Board Rule R-7-14, 4 CCR 801 ("Employees with lower matrix ranking in the time band must be displaced before employees with higher matrix rankings, except no veteran can be displaced before a non-veteran regardless of rank").

The Board rules permit departments to use performance in the layoff evaluation, but several critical limitations are built into the rules. Departments use performance, in the form of a performance matrix, to rank individuals within time bands. Board Rule R-7-16, 4 CCR 801. Performance does not allow departments to take an individual out of his or her time band. Additionally, performance is to be measured as a three year average of overall performance evaluations, and not to be determined on an *ad hoc* basis. Board Rule R-7-17, 4 CCR 801. Departments can take other factors into consideration in building its performance matrix, but those considerations cannot account for more than 49% of the matrix evaluation and must be of a type that can be uniformly applied across the retention area (which in most cases is the department). Board Rules R 7-16 and R-7-17.

Veteran preference rights may also require that non-veterans are protected from separation so long as there are non-veterans with the same or less time in the employment of the state. *See* Colo.Const. Art. XII, §15(3)(a); *Kennedy v. Board of County Commissions of the County of Adams*, 776 P.2d 1159, 1162 (Colo.App. 1989)(holding that "[t]he plain meaning of subsection (3)(a) directs that employees not eligible for veterans' preference be laid off before eligible veterans with the same or more years of seniority"). *See also* Board Rule R-7-16.

Mr. Abbott's testimony at hearing that he took seniority and performance into account at the point he decided that Complainant's position should be abolished was not credible. The persuasive evidence in this matter was that wardens were given the task of identifying specific position numbers to be abolished, and therefore specific employees to be laid off, and were not told to produce time band analysis or given sufficient information to determine the continuous state service of their employees. No one at CTCF created time bands or used a performance-based matrix in deciding position abolishments.

State law mandates that, when certified employees are separated from state service "they shall be separated or demoted according to procedures established by rule." C.R.S. § 24-50-124(1).

The persuasive and competent evidence in this case proves that Respondent used a layoff process which violated the requirements of Board Rules R-7-9, 4 CCR 801 (the department "**shall** use time bands...") and R-7-14 ("employees in the most junior time band **must** be displaced before employees in more senior time bands"). Neither of these mandatory procedures was implemented during Respondent's decision on which Life/Safety officer was to be laid off. As such, the process used to abolish Complainant's position was contrary to C.R.S. §24-50124(1), and Board Rules R-7-9 and R-7-14.

2. Respondent's arguments that the layoff rules do not apply to abolishment are not persuasive:

Respondent's argument as to the propriety of its abolishment decision is not focused on compliance with Board rules. Instead, Respondent offers the argument that Complainant was not laid off because he was able to bump without demotion into a similar position at FLCF, that he did not lose pay status and tenure as a result, and that therefore none of the rule or statutory protections in layoffs apply to Complainant in this case. In other words, Respondent's position is that no one is laid off unless and until they end up losing pay, status, or tenure, as would happen if they were demoted or were actually out of a job.

It is clear, of course, that someone who is demoted or is actually out of a job certainly qualifies as having been laid off under the Board's rules. But the

application of layoff procedures, and the protections available under the Board rules to someone who is laid off, is not limited to this group.

Respondent's argument is founded upon the statement that "it is well established that state employees may be entitled to relief only when they are separated from their job and suffer a loss of pay, status, or tenure as a result of their position being abolished." Respondent's Closing Argument at p.1. In support of this argument, Respondent cites to seven cases: Rice v. Auraria Higher Education Center, 131 P.3d 1096 (Colo. App. 2005); Velasquez v. Department of Higher Education, 93 P.3d 540, 541 (Colo.App. 2003); Lawley v. Department of Higher Education, 36 P.3d 1239, 1242 (Colo., 2001); Halverstadt v. Department of Corrections, 911 P.2d 654, 656 (Colo.App. 1995); Bardsley v. Department of Public Safety, 870 P,.2d 641, 643 (Colo.App. 1994); Sutton v. University of Southern Colorado, 870 P,2d 650, 652 (Colo.App. 19940; Colorado Assoc. of Public Employees v. Department of Highways, 809 P.2d 988, 992-93 (Colo. 1991).

Respondent's argument, however, is not persuasive.

Respondent's argument is unpersuasive in part because it is circular: According to Respondent's theory, Complainant has not been laid off (and therefore entitled to Board relief) because he was provided with retention rights to a position with the same pay, status and tenure that he received only because he had been laid off. The fact that retention rights have been provided does not eliminate the fact that Complainant was laid off. Under the Board's rules, everyone who received retention rights has been laid off. That is the only route to receiving retention rights.

Second, this situation would leave employees in the untenable position of being laid off and having to go through the retention process without recourse for problems and errors in the first step of that process – the initial determination that they were the proper candidates under Board rules to be laid off. The law is well established at this point that employees do have an administrative remedy through the Board to challenge lay off decisions, even if they manage to bump into a position of equal pay, status, and tenure. *See Hughes v. Dept. of Higher Education*, 934 P.2d 891, 893-94 (Colo.App. 1997) (rejecting the argument that employees who have bumped into a position with similar base pay, status, and tenure are not authorized to appeal to the Board for review of the process).

Respondent's cited cases also do not support the broad proposition that Respondent argues.

Lawley, supra, *Velasquez, supra*, *Halverstadt, supra*, and *Bardsley, supra,* all involved employees who had either been separated from state service or demoted as part of a re-organization. The discussion in these opinions, however, does explicitly or impliedly support the broad proposition advanced by

Respondent. None of these decisions limit the right of a certified employee to challenge the initial determination that his or her position number was to be abolished.

Department of Highways, *supra*, *May*, *supra*, and *Rice v. Auraria Higher Education Center*, *supra*, are all challenges to the constitutionality of proposed transfers of certified employee functions. All three cases stand for the proposition that "state agency 'reorganizations' are unconstitutional [under the Civil Service Amendment] when state employees are terminated without being provided the option of remaining within the state personnel system." *Rice*, 131 P.3d at 1101. These cases do not interpret the meaning of the Board's layoff rules or speak to the question of whether the layoff rules apply only to retention decisions.

None of these opinions limit the ability of a certified employee to seek Board review of the initial decision abolishing his or her position. *Hughes*, on the other hand, squarely stands for the opposite proposition: that is, an employee who bumps into a position of the same pay, status and tenure, is not foreclosed from challenging the layoff decision before the Board. *See Hughes*, 934 P.2d at 893-94.

The language of the Board's rules also supports the proposition that an employee who has been laid off is an employee whose position has been abolished, and not just one who has then either not been given, or has refused to accept, retention rights to another position.

Board Rule 7-12, 4 CCR 801, for example, states that the department "must provide written notice to certified employees who are to be laid off at least 45 calendar days before the layoff is effective." That notice is the trigger for the employee to declare that they wish the department to determine their retention rights.

This rule makes no sense if one assumes, as Respondent does, that laid off employees are only those employees who, at the end of the lay off procedure, have either been demoted or are actually out of a job. The rule clearly contemplates that notice will be given to all of those employees whose positions are about to be abolished, and that this notice will give them early warning of the impending abolishment of their positions and a chance to receive a retention rights offer from the department. In any lay off procedure, at least some of these employees are likely to ask for and receive retention rights offers, and presumably some would be able to accept offers for a position of similar pay, status, and tenure. That does not mean, however, that the department did not owe those employees a notice 45 days ahead of the time when they were to be laid off in order for them to ask for their retention rights. The Board rule obviously contemplates that employees are to be considered to be "laid off" when they become eligible to ask for retention rights. As a practical matter, that point is

reached for employees directly after a department has decided that their specific positions numbers are to be abolished.

B. Respondent correctly applied the retention rights rules to Complainant's position:

Complainant challenges the result of the retention rights analysis which gave him his highest level retention rights at Ft. Lyons on the grounds that he should been permitted to assume another type of GP III position.

The HR section, however, generated a thorough application of the Board's rules on retention rights. Much of this analysis is contained within the Retention Matrix publication. A comparison of that document and the Board rules demonstrates that Respondent applied the essential requirements to the question of retention rights.

In the case that there is more than one employee in a time band, the employees will then be ranked within the time band through the use of a performance-based matrix. Board Rule R-7-9. Respondent's Retention Matrix recognizes that seniority is the first issue to be decided, and that the matrix is used to rank employees within a seniority time band.

The Board rules require that a matrix be created in order to rank individuals within a time band, and that this matrix is to be made available to all employees at least 15 days before any layoff notices are issued. Board Rule R-7-16, 4 CCR 801. The matrix must use an "average of the latest three years' annual performance ratings." Board Rule R-7-17. The matrix must "give at least 51% of the total value to performance " as measured by that average. The rules provide some other specifics on how performance ratings are to be evaluated for purposes of use in the matrix. *Id.* The evidence in this case shows that Respondent used a matrix which was based 100% on annual performance evaluation, with other factors to be applied only as tie breakers. Performance was also evaluated through the use of the overall evaluation results in the prior three years of evaluations. This comports with the Board rules.

The matrix needs to be designed so that it can be "consistently applied throughout the retention area." Board Rule R-7-16, 4 CCR 801. Retention areas are the areas in which employees will have retention rights. Board Rule R-7-13, 4 CCR 801. The evidence in this case does not suggest that HR applied the matrix inconsistently through the retention area, which was the entirety of DOC.

Within a time band, employees with lower performance matrix ratings must be displaced before employees who rank higher within the band. Veterans hold special status in this regard, however. Board Rule R-7-16 ("Employees with lower matrix ranking in the time band must be displaced before employees with

higher matrix rankings, except no veteran can be displaced before a non-veteran regardless of rank.") The evidence in this case supports that HR considered the most junior Life/Safety officers to be the ones with the lowest ranking, and therefore highest risk of displacement. That is consistent with the Board's rule. There was no credible evidence offered that HR failed to take veteran status into effect for the purpose of determining retention rights.

The Board rules also provide that an employee is to be given one or two retention offers, in a specified order of priority. Board Rule R-7-19, 4 CCR 801, provides that an employee will receive either one retention option within a 50 miles radius, or one offer for a position outside of 50 miles and one option within 50 miles. In terms of the types of offers to be made, the rules provide that retention rights are to be offered in the following order of priority:

1. Funded vacant position in the current certified class. If there are no vacant positions, occupied positions are offered in the following order: provisional, probationary, conditional, certified.
2. Funded vacant position in a previously certified class at the same maximum pay rate. If there are no vacant positions, occupied positions shall be offered in the following order: provisional, probationary, conditional, certified.
3. Highest level demotion in a vacant position in the current or previously certified class series. If there are no vacant positions, occupied positions shall be offered in the current or previously certified class in the following order: provisional, probationary, conditional, certified. An employee can displace another certified employee only if the displacing employee has been certified in the class.

Board Rule R-7-18, 4 CCR 801.

In this case, Complainant received two retention offers. The first was a funded certified position in the currently certified class. Given the rules that protect employees from displacement by requiring displacement of the most junior employee first, Respondent's provision of Mr. Abney's position – the lowest ranking Life-Safety officer in terms of protection from bumping -- was a reasonable interpretation of the rules.

Unlike the situation with the lay off decision process, there is no persuasive support in the record for the contention that Respondent failed to follow Board rules in determining retention rights in the way the retention program was structured.

Complainant's primary argument is that the specific rights granted to him were incorrect. He argues that he was entitled to obtain other GP III positions, such as the warehouse position in Denver. As the findings of fact show, however, Complainant needed to have the minimum and any applicable special qualifications in order to be able to bump into those positions, and GP III positions are a broad category of positions that do not allow easy movement between job titles. Complainant has failed to present sufficient evidence that he was indeed qualified for any position other than the ones offered.

Complainant complains that other employees, such a case managers, were allowed to transfer into CO II or CO III correctional officer positions and that no one offered that option to him. Complainant has failed, however, to establish that he was entitled to such consideration or that he was in a similar position to those who could qualify for such a transfer. The evidence in this case was that Complainant was previously certified as a COI, and the record is bare of proof that he had the qualifications for COII or CO III positions.

Complainant also challenges the sufficiency of HR's determination to use employee resumes and PDQs in gauging retention rights, rather than performing an evaluation of the employee's entire personnel file.

It was not unreasonable for HR to use a current resume and the PDQ in determining the qualifications held by laid off employees. The process of gathering current information in a resume format allows employees to highlight what they wish HR to consider. The PDQ also allows HR to gather an objective evaluation of the types of authority exercised and skills needed for an employee's position. The Board's rules do not require any other method be used for this evaluation. In the absence of any requirement to the contrary, HR's reliance on PDQ's and current resumes constitutes a reasonable basis for determining employee qualifications.

C. Complainant has not proven a case of age discrimination:

Complainant argues in his closing statement that the lay off and retention rights process used by Respondent "disproportionately affected older workers."

Under the Colorado Anti-Discrimination statutes, it is a "discriminatory or unfair employment practice... for an employer ...to discharge [or]... to harass during the course of employment... any person otherwise qualified because of... age. For purposes of this paragraph (a), 'harass' means to create a hostile work environment based on an individual's race, national origin, sex, disability, age or religion..." C.R.S. § 24-34-402(1)(a). The act also defines four practices which are not a discriminatory or unfair employment practice with respect to age; none of these four circumstances apply to the instant matter. *See* C.R.S. § 24-34-402(4).

A *prima facie* case of age discrimination requires that Complainant show: 1) that the complainant belongs to a protected class; 2) that the complainant was qualified for the job at issue; 3) that, despite his other qualifications, the complainant suffered an adverse employment decision *e.g.,* a demotion or discharge or a failure to hire or promote; and 4) that the circumstances give rise to an inference of unlawful discrimination. *George v. Ute Water Conservancy Dist.*, 950 P.2d 1195, 1197 (Colo.App. 1997) *quoting Colorado Civil Rights Commission v. Big O Tires, Inc.*, 940 P.2d 397 (Colo. 1997)(modifying the approach used in Title VII cases to apply to the various forms of discrimination set forth in C.R.S. §24-34-402).

To support this argument, Complaint must be able to point to circumstances which give rise to an inference of unlawful discrimination. *See George*, 950 P..2d at 1197(holding that one of the essential issues for establishing a *prima facie* case of age discrimination under the state anti-discrimination act is "evidence sufficient to create an inference that an employment decision was based on an illegal discriminatory criterion"). *See also EEOC v. Prudential Federal Savings & Loan Ass'n,* 763 F.2d 1166, 1170 (10th Cir. 1985)(holding that plaintiff need not prove that age was the sole reason for the employer's acts, but must show that age "made the difference" in the employer's decision). This situation does not lend it itself to such an interpretation.

In the case of the abolishment of Complainant's position, the individual who took over Complainant's position was a man who is six months younger than Complainant. This is insufficient to raise a *prima facie* case of age discrimination as a matter of law. *See George*, 950 P.2d at 1198 – 99 (holding that an age difference of two years and nine months was insufficient as a matter of law to support an age discrimination claim under C.R.S. § 24-34-402; citing cases holding that replacement by another worker two of three years younger fails to meet *prima facie* requirements, but that disparities of five or ten years are more likely to suffice for a *prima facie* showing).

The findings in this case do not include either direct or circumstantial support for the proposition that the individuals who determined that Complainant should be laid off used age as a factor in their consideration. Even if one were to assume that Complainant met his *prima facie* requirements, the facts of this case show that Complainant's position was abolished because the facility needed to reduce its work force to one Life/Safety officer and Complainant was viewed as the Life/Safety officer whose performance was lacking. Complainant has not been able to demonstrate that this consideration was merely a pretext for age discrimination.

Complainant does not limit his argument to direct or indirect evidence of intentional discrimination. He argues that a disparate impact theory supports his age discrimination contention.

As the United States Supreme Court has discussed, a disparate impact claim requires that the employee is "responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities." *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 241, 125 S.Ct. 1536, 1545, 161 L.Ed.2d 410 (2005)(adopting a disparate impact analysis for federal age discrimination claims analogous to the test of disparate impact on Title VII claims). As for the nature of the statistical disparity required, the Supreme Court has also held that causation must be shown through the plaintiff offering "statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotion because of their membership in a protected group." *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 994-95, 108 S.Ct. 2777, 2788-89, 101 L.Ed.2d 827 (1988)(describing the *prima facie* test for disparate impact in Title VII cases).

In this case, Complainant has presented evidence of the results of the layoff process on the small group of employees within the Life/Safety officer job title, and two anecdotal examples of long time DOC employees being laid off.

There was insufficient evidence to establish an overall disparity in the lay off process. The fact that two long time DOC workers were laid off in the 2003 process does not tell us anything about a process in which approximately 180 lay off letters were sent out in just the third round of the lay off process.

As for any statistical evidence of a disparity which proves causation, it is important to note that the sample of Life/Safety officers is very small. If one person was added or removed from the two groups, the groups are so small that this change would modify the percentages radically. Such small samples "must be evaluated with caution." *Lucas v. Dover Corp., Norris Division*, 857 F.2d 1397, 1403 (10th Cir. 1988)(holding that a sample size of 18 supervisory employees who had been laid off was "quite small"). *See also Matthews v. Allis-Chalmers*, 769 F.2d 1215, 1218(7th Cir. 1985)(per curium)("Statistics generally are not of significance in age discrimination cases unless the disparities in treatment are quite large").

Additionally, presentation of just the ages of Life/Safety officers does not answer the question of whether all of these individuals are similarly situated, and that the final percentages do not result from non-discriminatory effects. See *Doan v. Seagate Technology, Inc.*, 82 F.3d 974, 979 (10th Cir. 1996)("Statistical evidence which fails to properly take into account nondiscriminatory explanations does not permit an inference of pretext"). The layoff decisions were made, for example, on a facility-by-facility basis. To be assigned to a facility that did not have a problem with the maintenance budget line would result in a very different set of considerations for the Life/Safety officer than to work in a facility such as Complainant's, which did have to reduce the maintenance budget line. It was Complainant's burden to provide sufficient information in the record for the

undersigned to conclude that he had was indeed considering similarly situated individuals. Complainant has failed to do so in this case.

Additionally, it also appears that Complainant is arguing that he was entitled to special protection, in the form of rights based on his seniority, and that the failure to provide him with these special protections is what he believes is age discrimination. The federal age discrimination act (the ADEA), however, does not require employers to offer special protections to older workers. *See EEOC v. Sperry Corp.*, 852 F.2d 502, 509 (10th Cir. 1988)(holding that "the ADEA does not require special treatment for older workers"); *Tice v. Lampert Yards, Inc.*, 761 F.2d 1210, 1217 (7th Cir. 1985)(holding "the ADEA mandates than an employer reach employment decisions without regard to age, but it does not place an affirmative duty upon an employer to accord special treatment to members of the protected age group").

Complainant has therefore failed to establish a *prima facie* case of age discrimination and, even if such case was found on this record, has failed to demonstrate that non-discriminatory reasons for the abolishment of his position were a pretext for age discrimination.

D. Disciplinary Case:

Certified state employees have a property interest in their positions and may be disciplined only for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, et seq., C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule R-6-9, 4 CCR 801 and generally includes:

(1) failure to comply with standards of efficient service or competence;
(2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
(3) false statements of fact during the application process for a state position;
(4) willful failure or inability to perform duties assigned; and
(5) final conviction of a felony or any other offense involving moral turpitude.

In analyzing a disciplinary action, the Board uses a four step process: 1) did Complainant commit the acts alleged? 2) Was the Respondent's decision to discipline arbitrary, capricious or contrary to rule or law? 3) Was the discipline chosen within the range of reasonable alternatives available to the appointing authority? 4) Are attorney fees warranted?

1. Complainant committed most of the acts alleged:

The findings in this case demonstrate that Complainant fell asleep while on duty on June 25, 2005, that he returned to work in violation of a direct order, and that he failed to recharge a cell house 1 fire extinguisher. These events were supported at hearing by a preponderance of the evidence.

The allegation that Complainant did not re-charge the Scott air packs, however, was not supported by a preponderance of the evidence.

The fire extinguisher issue was supported by memos issued by Officer Reams on May 5, 2003 and again on June 2, 2003. Complainant also stated that he had been there to check on the extinguisher in between these two memos, which supports the proposition that there was a report that he received about the charging status of that extinguisher.

There was no contemporaneous report offered for the Scott air packs issue, however. It does not appear that Officer Reams reported it to anyone in authority until July 8, 2003, when he was asked to write out a report. Officer Reams also states, in his July 8 report, that Complainant told him there was no money to re-charge the air packs, and this statement is odd given that the facility could recharge the air packs without incurring cost.

There was a sufficient difference between the corroboration and logical consistency of these two charges, along with the undersigned's evaluation of the witnesses' testimony at hearing, to warrant treating these two events differently in the findings of fact.

2. Respondent' s disciplinary action were not arbitrary, capricious or contrary to rule or law:

In this matter, Mr. Abbott reviewed incident reports that had been prepared by staff, the vast majority of which were contemporaneous records of the events in question. There was no persuasive argument presented that he ignored information provided to him by Complainant, or that he failed to investigate the matter to a reasonable degree. Mr. Abbott did not accept Complainant's version of events for the most part, but he had a reasonable basis in the information before him to make such a determination.

a. Complainant's argument that his falling asleep was due to medication does not result in a different outcome:

Complainant argues that, because his falling asleep was a product of his taking a new medication, he cannot be held to have intentionally violated the rules of conduct.

Complainant was not disciplined just for intentional or willful violations; he was also found to have failed to perform competently. Falling asleep on the job within a correctional facility is the type of a failure to perform that could be captured by that charge, regardless of the cause.

b. The refusal to produce records after the 6-10 meeting does not result in a different outcome:

Complainant argues that the failure to provide him with all of the documents he requested after the 6-10 meeting constitutes a violation of the Board rules concerning 6-10 meetings.

The Board's 6-10 rule is designed to provide an employee with the opportunity to explain his or her version of events to the appointing authority prior to the decision being made as to whether the events warrant discipline. In support of that proposition, the appointing authority must do at least three things: 1) meet with the employee to present information about the reason for potential discipline; 2) disclose the source of that information unless prohibited by law; and 3) give the employee an opportunity to respond. Board Rule R-6-10, 4 CCR 801. "The purpose of the meeting is to exchange information before making a final decision." Id.

The 6-10 meeting, however, is a meeting and not a hearing. There is no explicit provision in the rules requiring appointing authorities to produce discovery, other than in identifying the reason for potential discipline and to disclose the source of the information. A fundamental function for the meeting is for the employee to be able to present what he or she knows about the incident. It seems as if it would be an unusual situation where a document request would be necessary, and implicitly authorized by the rule, to allow the employee to explain what he or she knows about the matter.

In this case, the request provided to Mr. Abbott was a document request along the lines of the types of requests filed in preparation for a Board hearing. It did not explain why Complainant needed to review the materials. Complainant explained his reasoning in asking for these documents at hearing, but his explanations did not reflect a desire to refresh his memory as to the issue of if and when he received a request to recharge the extinguisher or the Scott Air Packs. Additionally, these were not records that Complainant wanted Mr. Abbott to review. The record request that Complainant filed with Mr. Abbott was designed for the purposes of litigation and not for the purpose of allowing Complainant to tell his side of the story.

Given the nature of the requests, there is insufficient evidence to find that the appointing authority failed to honor the explicit or implicit requirements of R-6-10 by declining to provide most of the requested documents.

c. Warden Abbott was Complainant's appointing authority:

Complainant offers several arguments as to why he believes Mr. Abbott is not authorized to have held 6-10 meetings with Complainant and issue discipline in this case.

The first argument is that the Administrative Organization Act of 1968 leaves the head of the Division of Adult Parole in charge of all correctional facilities, and that Mr. Abbott received his delegations of appointing authority not from that division but from Nolin Renfrow, Director of Prisons.

Complainant's argument is founded in language within C.R.S. § 24-1-128.5(2), which reads:

> The department of corrections shall consist of the following divisions:
>
> (a) The division of adult parole, the head of which shall be the director of the division of adult parole... The division of adult parole shall supervise and control each correctional facility, as defined in section 17-1-102, C.R.S., including but not limited to the state penitentiary at Cañon City, the Colorado state reformatory at Buena Vista, and the women's correctional institution at Cañon City...

Whatever the Director of Adult Parole's authority may be in terms of DOC facilities, however, this statute does not answer the question of who Complainant's appointing authority may be under the state's civil service provisions.

Board Rule R-1-5, 4 CCR 801, defines the appointing authority as the "executive directors of principal departments and presidents of institutions of higher education" for their own offices and division directors. Division directors, in turn, are the appointing authorities for their respective divisions. *Id.*

Under both C.R.S. § 24-1-128.5(1) and C.R.S. § 17-1-101(1), the head of the Department of Corrections is the Executive Director, who is this case is Joseph Ortiz. Section 17-1-101(2), C.R.S., allows Mr. Ortiz to establish "such other divisions and programs as are deemed necessary by the executive director for the safe and efficient operation of the department." He is able to appoint the heads of such divisions and the heads of those divisions are given the power to appoint such other personnel as are necessary.

Mr. Ortiz has a number of division heads under his supervision. One of them is the Director of Prisons, which at the time of this matter was Nolin Renfrow. As the evidence in this matter shows, the instructions on how to handle

the personnel layoff and retention procedures came from Mr. Renfrow. Complainant has presented no evidence that he was ever employed within the Division of Adult Parole; all of the evidence available points toward the conclusion that Complainant was employed by the Director of Prisons.

Given that that was no evidence presented in this case that Complainant was employed by the Division of Adult Parole, C.R.S. § 24-1-128.5(2) does not describe Complainant's appointing authority.

Complainant's second argument is that Mr. Abbott was not his appointing authority between the time his CTCF position was abolished on June 30, 2003, and Mr. Abbott obtained a written delegation of authority on September 23, 2003.

The Board rules provide: "In the area of corrective, disciplinary, or other actions which may have an adverse affect on base pay, status, or tenure, each agency must establish a written document specifying the appointing authority for each individual and this information must be made available to the employee." Board Rule R-1-5, 4 CCR 401.

Complainant has not contested that Mr. Abbott was his appointing authority prior to the abolishment of his position (other than as described above in the argument involving the Division of Adult Parole). His argument that his appointing authority changed when his position was abolished is based entirely on his argument that the funding for his position determines his appointing authority, and that once his new position was funded elsewhere, Mr. Abbott lost any authority over him.

While it may be true that the appointing authority generally has control over the funding line for the employee as well – the appointing authority certainly needs to have an available funding source in order to appoint someone, for example – appointing authority is not defined under Board rules according to funding lines. It is a matter of delegation from the division director. *See* Board Rule R-1-5.

Complainant was in transition after June 30, 2003. Mr. Abney was still working in his position at FLCF on July 8 and 9, 2003, and then Complainant's new assignment was slated to begin July 10, 2003. The administrative suspension imposed on July 9, 2003, kept Complainant from reporting to his new assignment until after the September 23, 2003, 6-10 meeting. Complainant was then given permission to continue to work in Cañon City for Mr. Atherton until January, 2004. There is no indication in the record that there was any change in the delegation of appointing authority status from Mr. Abbott during that time period, which is not surprising given the fact that the warden for FLCF, Warden Zenon, had no involvement in any of the matters under consideration during that time and Complainant had not yet worked at FLCF.

The evidence in this case does not demonstrate that there was a violation of either the express terms or the spirit of the Board rules for Mr. Abbott to continue as Complainant's appointing authority while he was in transition and before he was actually working at FLCF.

3. The choice of sanctions is not within the reasonable range of alternatives:

Mr. Abbott determined that a permanent pay reduction of $300 per month was necessary in this case because Complainant had already been subject to a $100 month reduction for six months for similar behavior by Warden Novak.

It is not unreasonable to assume that a heavier penalty needed to be applied, given Complainant's history of similar performance issues. A permanent pay reduction, however, is a punishment without end, and the numbers add up to unreasonable levels rather quickly. This case is nearing its three-year mark since the discipline was originally imposed, and in that time Complainant will have lost $10,800. That amount is wildly disproportionate to any harm that Complainant has caused by falling asleep, disobeying an order not to return until Friday by returning Thursday afternoon, and in failing to recharge a fire extinguisher.

When an appointing authority imposes an unreasonable level of discipline, the Board has the authority to modify that sanction to a reasonable level. In this case, given the need to increase the severity of the discipline over the $100 per month for six month sanction imposed by Warden Novak, the figure of $300 per month will be maintained. The sanction will be limited to a six-month period so that Complainant will lose a total of $1,800.00 from his base pay.

E. Grievance Issues:

Under C.R.S. §24-50-123(3) as it existed at the time of the filing of Complaint's grievances, the Board was authorized "to review the decision of the appointing authority [to a grievance] and, upon such review, shall uphold the decision unless the board finds that the decision was made arbitrarily or capriciously."

In determining whether an agency's decision is arbitrary or capricious, a reviewing tribunal must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education,* 36 P.3d 1239, 1252 (Colo. 2001).

Complainant has included a host of grievance issues in his appeals to the Board. For the reasons given below, not all of those issues are properly before the Board at this juncture. The first step in analyzing the grievance issues, therefore, is to determine which issues were properly filed and to eliminate the incidents which are not properly before the Board.

1. Procedural History of the Two Grievance Petitions:

a. The December 12, 2003 Petition for Hearing:

On December 12, 2003, Complainant filed a Petition For Hearing with two Step II grievance letters attached. Both letters were signed by Eugene Atherton, Assistant Director, Western Region.

On December 18, 2003, the Board ordered Complainant "to provide a copy of his grievance initially filed with the Department of Corrections." The Order noted that failure to provide a copy of the grievance as well as a copy of the agency's final decision would be a violation of Board Rule R-8-8(3), 4 CCR 801.

Complainant filed a Response to Request for Additional Information ("Response") on January 5, 2004. Complainant argues in the Response that he had filed numerous grievances which he believed were part of his Petition, and attached 13 documents. A review of the Response and the attachments shows the following:

- The discussion and attachments start with references to the grievance of an unnamed performance document placed into Respondent's file, as well as grievance of inquiries into Complainant's personal life and the creation of a negative work environment. Complainant did not produce a copy of his original grievance. The first paperwork associated with this grievance supplied by Complainant is a June 30, 2003 memo "Response to Step I Grievance" from CTFC Associate Warden Kevin Milyard.

- A grievance form dated July 17, 2003 and date stamped July 21, 2003, relating to the July 9, 2003 administrative suspension with pay.

- An undated grievance form relating to the August 11, 2003 incident when Complainant and his wife were detained inside the gate of CTCF after having been allowed to drive into the facility and had gone to the communications building to exchange a broken pager clip. Complainant's Response documents that this grievance form was filed August 15, 2003.

- A grievance form dated September 26, 2003, grieving a September 26, 2003, performance evaluation by Kevin Milyard which rated Complainant overall as needing improvement.

- An October 30, 2003 grievance form grieving a corrective action issued in October 2003, as well as the failure to return Complainant's personal property or pay for personal property.

b. Analysis of the Grievance Issues and Incidents presented in the December 12, 2003 Petition Properly Before the Board:

As the Board made clear in its original request for information, Complainant had to provide a copy of his original grievance for the first incident listed above, and he did not do so. Without that information, it is unclear as to the scope of that particular grievance, whether it fit within the rules as a document which could be grieved, or whether the initial grievance was timely filed. Accordingly, that incident is not properly preserved for appeal by the Board.

The September 26, 2003 grievance form states that Complainant is grieving a performance evaluation that he believed was "retaliatory and false," and that he believed the document to be harassment. Complainant asks to have the document removed from his file and to stop the retaliation and hostile work environment. Board Rule R-8-5, 4 CCR 801, however, states that "[i]ssues pertaining to leave sharing, discretionary pay differentials, and/or a performance evaluation and its components that do not result in corrective or disciplinary action are not grievable or appealable." Given that the September 26, 2003 grievance is a primarily a grievance of a performance evaluation and a request that the document be removed from Complainant's file, that portion of the grievance is not permissible under Board rules. To the extent that such a performance review is found to be a result of retaliation, however, it can be reviewed by the Board.

This analysis leaves five incidents as the basis of grievances and proper subjects of the December 12, 2003 Petition For Hearing:

1) The decision to place Respondent on paid administrative leave on July 9, 2003, while the possible theft of state property was investigated;
2) The detention of Complainant and his wife inside the gates of the CTFC facility on August 11, 2003;
3) The October 2003 corrective action issued to Complainant;
4) The failure to return or to pay for personal property, and
5) The claim that the September 26, 2003 was issued as retaliation and created a hostile work environment.

The December 12, 2003 Petition For Hearing also included a Whistleblower Complaint Form, which is the first time such a claim had been filed in this matter. In that complaint, Complainant alleged that he had spoken out to several legislative representatives and made public statements "upon receiving his layoff notice" and that he "spoke out and notified legislative representatives of the targeting of older employees by DOC in the layoff process and retention rights given."

At the point where Complainant was to provide a description of the discipline or penalty that allegedly violated the Whistleblower Act, Complainant referred only to the attached appeal form. Insofar as the incidents which are implicated by Complainant's petition, therefore, the Whistleblower Complainant does not expand the number and type of disciplinary actions or other DOC actions which are before the Board for consideration.

Additionally, the Whistleblower Complaint was filed as an adjunct to a series of timely-filed grievances. If Complainant had intended to argue that the earlier events (events which are not a part of the December 12, 2003 grievances, such as the retention rights decision), were also the result of whistleblower retaliation, the Whistleblower Complaint needed to be filed at the time of those events.

The State Employee Protection Act provides that Whistleblower Complaints can be filed 30 days after the employee "knew or should have known of a disciplinary action," C.R.S. § 24-50.5-104(1). Alternatively, the act allows claimants to file whistleblower complaints as a defense in any grievance or appeal, and those complaints "shall be determined by the state personnel board as a part of the related grievance or appeal." C.R.S. § 24-50.5-104(3). Given that the Board's rules provide that a claimant in a grievance or appeal has ten days from the appeal triggering event (such as receipt of the disciplinary action notice, the step II grievance response, etc.) to file with the Board, this would place another set of time limits on the filing of Whistleblower Complaints.

As an example, consider the effect of these time requirements on Complainant's dispute over the abolishment of his position. Complainant filed a timely appeal with the Board concerning that action, and the language of C.R.S. § 24-50.5.-104(3) requires that he also file the Whistleblower Complaint at the time he filed his Board appeal, or waive the right to file the complaint.

The end result of this analysis is that Complainant's Whistleblower Complainant is limited to the events which triggered the specific grievances that he filed at the same time – the events described in the December 12, 2003, petition, and cannot be used to link the other issues of this case to the Whistleblower complaint.

c. The February 23, 2004 Petition For Hearing:

On February 23, 2004, Complainant filed a second Petition for Hearing ("Second Petition") which was placed into the 2003B150 case file. The Second Petition lists the reasons for the appeal or dispute to be that there was arbitrary and capricious action in that "DOC and Warden Abbott have wrongfully converted my personal property, created a hostile work environment, violated the regulations on handling of Step I grievance, and refused to grant relief." The document attached to the Second Petition was an amended Step II grievance response letter dated February 9, 2004, from Mr. Atherton.

Complainant did not submit a copy of his Step I grievance from with the Second Petition, but there was no Board order in this case requiring the submission of the document. The letter from Mr. Atherton records that the step I grievance related to the disposition of personal property. Complainant apparently raised a series of procedural arguments in the handling of his grievance on the personal property issues, and Mr. Atherton for the most part denied those issues has having not been raised at the Step I level. Mr. Atherton's letter does not dispute that the Step 1 grievance was timely filed.

Insofar as an appeal of a grievance issue is concerned, therefore, the Second Petition appears to duplicate the December 12, 2003, Petition in that it is focused upon the personal property issue and the manner in which Respondent has handled that issue.

2. Analysis of the Grievance Issues:

The grievance matters come down to one essential dispute: Complainant believes that the bad reviews and bad interactions he has experienced are due to the fact that Respondent is unfairly targeting him, and the targeting is variously described as being because of his age, because of his willingness to speak out publicly about the layoff procedures, and because of his willingness to grieve decisions.

In such a dispute, it is Complainant's burden to show that the actions of the appointing authority have been arbitrary, capricious or contrary to rule or law.

With only one exception which will be discussed below, Respondent has been able to demonstrate that its handling of Complaint's grievances was grounded in fact, reasonable, and not contrary to rule or law.

a. The decision to place Respondent on paid administrative leave on July 9, 2003, while the possible theft of state property was investigated;

Complainant has not pointed to any procedural violation which occurred when Mr. Abbott decided to place him on administrative leave while the investigation was on-going.

Complainant instead seems to depend upon an argument that the investigation, and referral to the Inspector General's office, was so excessive as to be arbitrary, capricious or contrary to rule or law. The belief that Complainant had taken supplies and other facility materials out of the facility, however, was reasonably grounded in the review of the boxes performed as he left the facility on July 7, 2003. It is also not unreasonable to refer a potential theft case to the Inspector General ("IG") for a full inquiry, even if the result is only that a minor amount of state material may have been taken from the facility. When there is an on-going inquiry such as this, it is also not unreasonable to place the employee on paid administrative leave while it is being conducted. Director's Procedure P-5-21 explicitly allowed for such a use of administrative leave.

Complainant has failed to present persuasive evidence that the decision to place him on paid administrative leave while the IG investigation was taking place was arbitrary, capricious, or contrary to rule or law.

b. The detention of Complainant and his wife inside the gates of the CTFC facility on August 11, 2003;

Complainant has not presented persuasive evidence that his detention, and of the detention of his wife in the same incident, was unwarranted under the facility rules. It is true that the guard waved them through at least initially, but Complainant should certainly have been aware of the strict limitations on bringing a personal vehicle inside the gate rather than walking into the facility, bringing non-DOC employees into the facility, and bringing dogs into the facility. It should have come as no surprise that there would be an immediate on-site inquiry about how the facility's security procedures were breached, once the mistake was discovered. In a secure facility such as a correctional institution, it is also not surprising that this type of investigation will result in a temporary detention.

Complainant has failed to demonstrate through presentation of persuasive evidence that Respondent's detention of Complainant and his wife on August 11, 2003 was arbitrary, capricious, or contrary to rule or law.

c. The handling of the property issue and Respondent's refusal to return or to pay for personal property,

Complainant contends that Respondent attempted to set him up by giving him a box of property to take home which included both items that clearly belonged to the state and at least some items that were alleged to have been missing from the facility.

It is clear at this point that the box of property offered to Complainant after his 6-10 meeting on September 20, 2003, did contain items which were state property. Complainant's fears that this was done to provide an excuse to charge him with stealing property, however, do not appear to be reasonable in this case. Respondent had completed an inventory of the items, and that inventory included the property that Complainant argues is state property. The creation of that inventory makes no sense if what Complainant alleges was true -- the set up will not work if Respondent clearly and obviously documents that it provided the materials to Complainant. It appears reasonable that these materials were included in the box as a mistake, and it was a good thing that Complainant was thorough in reviewing the materials early in the process. That does not, however, create an action which is arbitrary or capricious on Respondent's part.

Complainant has also argued repeatedly that there were items that he left in his office at CTCF on July 7, 2003, that were his personal property.

Unfortunately for Complainant, he has apparently never kept records of these items – no sales receipts, no permission to bring items into the facility, no permission to take items out. As the evidence currently stands, it is Complainant's word against the facility that the business-related items located inside the facility are his personal property and not the facility's or the state's property. That level of evidence is insufficient to show that Respondent has acted arbitrarily, capriciously, or contrary to rule or law in refusing to produce the items for Respondent.

d. The claim that the September 26, 2003 performance evaluation by Mr. Milyard was issued as retaliation and created a hostile work environment:

Mr. Milyard's September 25, 2003 performance evaluation was undoubtedly a difficult evaluation to receive.

As the factual findings of this case amply demonstrate, however, Mr. Milyard had a reasonable factual basis for his comments, and it was time to perform Complainant's close out evaluation. Complainant has failed to produce persuasive evidence that any of the evaluations made by Mr. Milyard in that performance evaluation were untrue or unreasonable interpretations of the facts,

or imposed as a form of retaliation. As a result, Complainant has failed to present persuasive evidence that Respondent acted in a manner which was arbitrary, capricious, of contrary to rule or law in giving him the September 26, 2003 evaluation.

Complainant's performance issues also present a strong non-retaliatory reason why he has not been able to obtain a transfer to return to Cañon City. In order to prove his case of retaliation, Complainant must be able to demonstrate that the reasons for the observed conduct are retaliatory in nature rather than a legitimate effect of a non-retaliatory cause. In this case, the evidence is strong that there have been significant and on-going performance issues which could also account for any problem Complainant is having in obtaining a transfer. Complainant has therefore failed to carry his burden to prove retaliation for either the Milyard performance review or as it related to his effort to obtain a transfer.

e. Whistleblower Complaint:

In order to invoke the protections of C.R.S. § 24-50.5-103, which prohibits any appointing authority or supervisor from initiating or administering any disciplinary action, as defined by the statute, "against an employee on account of the employee's disclosure of information...", the claimant must establish that his disclosures fell within the protection of the "whistle-blower" statute and that they were a substantial or motivating factor in the department's decision. *Ward v. Industrial Commission*, 699 P.2d 960, 967 -68 (Colo. 1985). If claimant makes such initial showing, then the department must establish by preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. *Id.*

In this case, it is not at all clear that Complainant made the disclosures required under that statute. Complainant's credible testimony on this point was vague and apparently uncertain; the preponderance of the evidence supports only the factual propositions outlined by Complainant in his proposed Findings of Fact on this point. There are no specific dates that can be reliably associated with any statement, no specific content for the statement, and no specific individuals.

Moreover, Complainant has failed to demonstrate by competent and persuasive evidence that the disputed actions taken by Respondent were indeed motivated in whole, or even in part, by any disclosures that Complainant may have made.

Complainant's explicit theory of events in this case demonstrates that Complainant had been identified as a poor performer from the very beginning of the layoff process, and well before he made disclosures or public statements. He had been subject to numerous counselings and performance plans in his employment with DOC, and he had received corrective actions and disciplinary

actions on incidents very similar to the ones that he received that are at issue in the December 12, 2003 grievances.

Respondent's position has been that Complainant was not unfairly targeted at any point because he was indeed making bad decisions, and those decisions were creating legitimate performance issues and had impaired Complainant's credibility with his supervisors and in his working relationships. Respondent points to the multiple instances where Complainant has been accused of not telling the truth, or not performing his job, of not following the chain of command, or not being reliable. These assertions have been supported by a preponderance of the evidence. Even if one accepts that Complainant ahs made protected disclosures, Respondent has met its burden in showing that it would have taken the same actions even in the absence of the protected conduct.

f. The October 20, 2003 corrective action:

Complainant's appeal of the October 20, 2003, corrective action have been covered in the analysis above, for the most part. One item remains from that letter.

Complainant has argued that the corrective action is retaliatory and that Mr. Abbott has "been arbitrary and capricious in his conduct and behavior toward Mr. Bennett and has specifically targeted Mr. Bennett for non bona fide reasons."

In review of the Corrective Action from October 20,2003, one finding appears to be an unreasonable interpretation of the stated facts. Mr. Abbott finds that Mr. Bennett violated AR 145-1, Staff Code of Conduct, paragraph IV.X. which reads "Staff shall neither falsify any document nor willfully depart from the truth, either in giving testimony or in connection with any official duties or official investigation."

In the issues considered in the letter, however, there does not appear to be a record of a statement that Respondent believes is falsified or represents a willful departure from the truth. While there are disputes of fact which are recorded, Mr. Abbott does not go the next step and explain why he believes (if he indeed does) that any of these disputes constituted a falsification or willful departure from the truth.

The rest of the allegations in that letter appears to be grounded in demonstrable fact. The allegation, however, that Complainant has falsified documents or willfully departed from the truth is the type of statement which should not be added without an analysis of why it is found to have applied. Without any explanation associated with the statement, it appears to be a gratuitous slam of Complainant, and is an inappropriate and unreasonable tactic. The references to that violation should be removed from the Corrective Action.

F. Attorney fees are warranted in part:

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. and Board Rule R-8-38, 4 CCR 801. The party seeking an award of attorney fees and costs shall bear the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule R-8-38(B), 4 CCR 801.

Given the above findings of fact, an award of attorney fees is warranted for part of the litigation.

Complainant has succeeded in reversing three of Respondent's decisions in this case: the decision to abolish his position, the decision to impose a permanent pay reduction of $600, the decision that he had made untruthful statements in relation to the events in his corrective action. Each one of these reversals must be analyzed to determine whether the reversal also meets the test for an award of attorney fees and costs.

Respondent has improperly abolished Complainant's position by ignoring the central tenets of the Board's rules on layoffs. It was clear from the record that Respondent was not confused as to how to construct and use seniority time bands and a performance matrix. Respondent used those tools in determining employee retention rights. When it came to restricting the discretion of the appointing authorities in choosing who they wished to lay off, however, the department simply eliminated the tools which are essential to the protection of certified employees. In trying to explain this choice of procedure, Respondent has offered a thoroughly unpersuasive circular argument: that the rules for layoffs do not apply to Complainant because he was given retention rights to a similar position after he was laid off, which means that he wasn't laid off.

Respondent has argued that a reasonable, albeit mistaken interpretation of the rules, is not grounds for an award of fees and costs as a bad faith action. *Halverstadt v. Department of Corrections*, 911 P.2d 654, 660 (Colo.App. 1995). The key is that the mistake has to be a reasonable interpretation of the law.

The plain language of the Board's rules do not support Respondent's contention. The rules apply seniority and performance considerations to layoffs and not just the application of retention rights. The Board explains how to construct three year time bands based on seniority, for example, under the title of "Determining Priorities For Layoff and Retention Rights". Board Rule R-7-14. Board Rule R-7-8, under the section marked as "Layoff Principles" mandates that "Departments must consider seniority and performance in making layoff decisions." Board Rule R-7-15 explains that "[f]or the purpose of layoff, seniority is the calendar year in which continuous state service began..." An interpretation

that these rules only address retention rights and not layoffs requires the reader to ignore the actual language of the rules.

It is also clear from the rules that the references to layoffs are not references to merely the assignment of retention rights. Board Rule R-7-12, for example, requires departments to provide a "layoff notice" which gives employees at least three working days from the date of delivery to state whether they want the department to determine their retention rights. The rules create a process with two steps – layoffs and retention rights – and nothing in language of those rules leads to the reasonable conclusion that the layoff disappears if Complainant is provided with retention rights for a position with the same pay, status, or tenure.

Respondent argues, however, that it is the case law (and not necessarily the rules) which come to the conclusion that an employee must actually lose his or her job or be demoted before he or she is considered to have been laid off and entitled to the protection of the layoff rules. As discussed earlier in this Initial Decision, the cited cases do not stand for that proposition. There is a Colorado case on point, however, which holds that the opposite is true.

Respondent also asserts that the Department of Personnel and Administration provided guidance to it on layoffs, and the DPA told Respondent that Respondent could use business reasons to determine positions to be abolished. From the evidence presented, however, it appears that DPA told Respondent that it could use business justifications in order to determine which positions could be abolished. There was no evidence presented in this case, however, that DPA told Respondent that it did not have to produce and apply time bands and a performance-based matrix, and that it could ignore those concerns and simply use its business judgment on who to lay off. Even if DPA had offered such advice, that advice would be as contrary to the language and spirit of the rules to render it an unreasonable interpretation.

Respondent's interpretation of the Board rules on layoff protections is a sufficiently strained and unreasonable interpretation of the Board rules and case law as to fall into the category of a bad faith interpretation of the rules. Complainant is entitled to recover attorney fees and costs related to his litigation of the abolishment issue.

Respondent has also imposed an unreasonable level of a base pay reduction as a result of the disciplinary action in this action. The finding that the base pay reduction rate was unreasonable when imposed as a permanent reduction, however, is not the same as finding that the appointing authority's decision on the level of discipline to be imposed was frivolous, done in bad faith, maliciously, as a means of harassment or otherwise groundless, and the undersigned does not find that attorney fees are warranted for this decision.

As for the stricken statement concerning untruthful statements, it is unclear from the record whether there was a factual basis for the assertion. Without at least some evidence of the basis for the findings, however, there is an insufficient basis to find frivolous, bad faith, malicious, harassing, or other groundless action.

Respondent also argues that an award of attorney fees and costs are warranted in this matter because Complainant has used the grievance process to "stir the pot" in order to receive a monetary settlement, and has grieved un-grievable, frivolous and duplicative issues. Respondent faults Complainant, for example, for raising issues which occurred in 2002 and in raising the fact at hearing that the Ft. Lyons facilities have had an asbestos problem, even though Complainant said he wanted no relief for this problem.

There is no doubt that Complainant raised his essential complaint that he felt he was being unfairly and unlawfully targeted in a multitude of ways. After all has been said and done, the evidence does not support his contention that everything which has happened is due to actions which were arbitrary, capricious, or contrary to rule or law. But some of what Respondent decided in this case was indeed wrong. It was wrong to lay off Complainant by ignoring seniority. That action opened the floodgates of mistrust and argument that Respondent was unfairly targeting Complainant in other ways as well. Complainant appears to have a genuine belief that the bad things which have occurred to him were at least in part due to retaliation. The undersigned is not persuaded that Complainant pursued his constitutional right to a hearing in order to annoy, harass, abuse, be stubbornly litigious or disrespectful of the truth. Respondent's request for attorney fees and costs is therefore denied.

CONCLUSIONS OF LAW

1. Respondent's decision to abolish Complainant's position was arbitrary, capricious, or contrary to rule or law.

2. Respondent's decisions as to Complainant's retention rights were not arbitrary, capricious, or contrary to rule or law.

3. Complainant committed the acts for which he was disciplined, with the exception of the recharging of the Scott air packs.

4. The discipline imposed upon Complainant was not arbitrary, capricious, or contrary to rule or law.

5. The discipline imposed was not within the reasonable range of alternatives available to the appointing authority.

6. The corrective action imposed by Respondent was arbitrary, capricious or contrary to rule or law insofar as it addressed Complainant's alleged violation of DOC AR 1450-1, Paragraph IV.X, and was not arbitrary, capricious or contrary to rule or law as to all other matters.

7. Respondent was not arbitrary, capricious or contrary to rule in law in the manner in which it handled Complainant's grievances.

8. Complainant is entitled to an award of attorney fees and costs for the litigation of the abolishment issue.

ORDER

Respondent's action is affirmed in part and rescinded in part. Complainant is reinstated to the GPIII Life/Safety officer position at the Colorado Territorial Correctional Facility retroactive to July 10, 2003. The $300 a month permanent pay reduction is modified so that the reduction is taken from Complainant's pay only for a period of six months. Complainant is to be refunded for any amount taken from his pay in excess of $1,800. The portion of the October 20, 2003, corrective actions which refers to Complainant having falsified documents or departed from the truth is rescinded and any finding related to that contention shall be removed from Complainant's personnel file. Attorney fees and costs are awarded to Complainant for the litigation fees and costs related to the appeal of the position abolishment.

Dated this 8th day of JUNE, 2006.

Denise DeForest
Administrative Law Judge
633 – 17th Street, Suite 1320
Denver, CO 80202
303-866-3300

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.); Board Rule 8-68B, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

The cost to prepare the record on appeal in this case is $50.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69B, 4 CCR 801. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An appellant may file a reply brief within five days. Board Rule 8-72B, 4 CCR 801. An original and 8 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Board Rule 8-73B, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Board Rule 8-75B, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the ALJ's decision. Board Rule 8-65B, 4 CCR 801.

CERTIFICATE OF SERVICE

This is to certify that on the 8th day of June, 2006, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

William S. Finger
Frank & Finger, P.C.
29025-D Upper Bear Creek Road
P.O. Box 1477
Evergreen, CO 80437-1477

and in the interagency mail, to:

Vincent Morscher
Assistant Attorney General
Employment Law Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

Andrea C. Woods